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FEDERAL COMMUNICATIONS COMMISSION

DEAN BURCH, Chairman

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F.C.C. 72–1063

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In Re Application of ROBERT P. ADAMS (ASSIGNOR) and PROGRESS RADIO NETWORK, INC. (ASSIGNEE) For the Assignment of License and SCA of Station KUTE–FM, Glendale, California	File No. BALH–1578 File No BASCA–465

MEMORANDUM OPINION AND ORDER

(Adopted November 28, 1972; Released November 30, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. Now before the Commission for consideration is a motion for stay of the effective date of the Commission's Memorandum Opinion and Order, FCC 72–990 released November 13, 1972, pending judicial review, filed by Mount Wilson FM Broadcasters, Inc. In that order we granted the application for assignment of the license of Station KUTE–FM, Glendale, California, from Robert P. Adams to Progress Radio Network, Inc., and denied a petition to deny the assignment filed by Mount Wilson FM Broadcasters, Inc. Mount Wilson has filed a supplement to its initial motion for stay which requests alternatively a stay to permit it to file a motion for stay with the Court of Appeals for the District of Columbia Circuit.

2. In support of its requests for stay, Mount Wilson FM Broadcasters, Inc. states that its station, KBCA–FM, Los Angeles, California, will suffer immediate, irreversible and irreparable injury. Mount Wilson's claim of irreparable injury is based on allegations that operation of KUTE(FM) by the assignee in conjunction with its present Black oriented AM station, KJFJ, Los Angeles, will dominate the Black audience in the market and thus deprive the petitioner of the audience and advertising support it presently enjoys.

3. It has been our practice to grant stays pending judicial review only upon a substantial showing by the petitioner that it will suffer irreparable injury or that the public interest will be adversely affected by the denial thereof, and that there is a reasonable likelihood that it will succeed on the merits of its appeal. *Wheeling Antenna Company, Inc.*, 26 FCC 2d 687 (1970); *Clarkston Broadcasters*, 24 FCC 2d 288 (1970); *Charles A. Haskel, et al.* FCC 72–707 (1972) —— FCC 2d ——. No adequate showing has been made here. The arguments advanced by Mount Wilson in support of its request for stay are essentially only a restatement of the allegations made in support of its

109–022—73——1

Petition to Deny the assignment. Upon a careful review of all petitioner's contentions which are fully discussed in our Memorandum Opinion and Order, *supra*, we concluded that there are no remaining substantial and material questions of fact requiring the application to be designated for hearing. For those reasons set forth in that decision Mount Wilson's motion for stay pending judicial review will be denied.

4. Mount Wilson Broadcasters, Inc. has filed a supplement to its request for stay pending appeal which requests, as an alternative, a stay to permit it to file a motion for stay with the United States Court of Appeals for the District of Columbia Circuit within seven (7) days of the release date of this Order. A temporary stay will be granted to afford petitioner an opportunity to apply for judicial stay since it seeks judicial review of our Memorandum Opinion and Order, FCC 72–990, adopted November 8, 1972 and released November 13, 1972.[1] Our stay is conditioned upon petitioner filing a motion for stay within seven (7) days of the release of this order.

5. Accordingly, IT IS ORDERED, That the Motion for Stay Pending Judicial Review filed by Mount Wilson FM Broadcasters, Inc. IS DENIED.

6. IT IS FURTHER ORDERED, That the effectiveness of the Commission's Memorandum Opinion and Order, *supra*, IS STAYED until the United States Court of Appeals for the District of Columbia Circuit acts upon any motion for stay *pendente lite* which Mount Wilson FM Broadcasters, Inc. must file within seven (7) days of the release date of this order.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

[1] Notice of Appeal was filed on November 9, 1972.

F.C.C. 72–1198

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of ESTABLISHMENT OF DOMESTIC COMMUNICATIONS-SATELLITE FACILITIES BY NON-GOVERNMENTAL ENTITIES	Docket No. 16495

MEMORANDUM OPINION AND ORDER

(Adopted December 21, 1972; Released December 22, 1972)

BY THE COMMISSION: CHAIRMAN BURCH CONCURRING AND ISSUING A STATEMENT IN WHICH COMMISSIONERS REID AND WILEY JOIN; COMMISSIONERS JOHNSON AND H. REX LEE CONCURRING IN THE RESULT; COMMISSIONER HOOKS CONCURRING IN THE RESULT AND JOINING IN PARAGRAPH 3 OF CHAIRMAN BURCH'S STATEMENT.

1. The Commission has before it six petitions for reconsideration or clarification of the *Second Report and Order* (*Second Report*) issued in this proceeding on June 16, 1972 (35 FCC 2d 844); various responsive and reply pleadings related to such petitions; a Memorandum of Understanding and supplementary Agreement submitted by Communications Satellite Corporation (Comsat) and MCI Lockheed Satellite Corporation (MCIL); and comments and reply comments on such Memorandum of Understanding and supplementary Agreement.[1] Those seeking reconsideration or clarification are: American Telephone and Telegraph Company (AT&T); Comsat; RCA Global Communications, Inc. and RCA Alaska Communications, Inc. (the RCA applicants); Network Project; National Association of Educational Broadcasters (NAEB); and Western Union International (WUI).

2. The *Second Report* adopted a policy of affording a reasonable opportunity for entry into the domestic communications satellite field by qualified applicants, subject to certain showings and conditions. Apart from the showings required by statute and an additional showing required of all common carrier applicants now engaged in providing essential communications services to the public (*Second Report*, paragraph 18), special conditions were placed on some pending applicants (*Second Report*, paragraphs 21–32, 34). The special conditions that are relevant to the instant petitions may be summarized briefly as follows:

a. AT&T's use of domestic satellites would be limited initially to MTT, WATS, AUTOVON, emergency restoration in the event

[1] A request for stay of the effectiveness of the *Second Report* was granted in part and otherwise denied by a Memorandum Opinion and Order issued on September 14, 1972 (FCC 72–807).

of terrestrial outage, and possibly other services in the case of Alaska, Hawaii and Puerto Rico-Virgin Islands (paragraph 21).

b. The Comsat/AT&T proposal based on their contractual lease arrangement would be disallowed (paragraph 22).

c. AT&T would have the option of applying for authority to own and operate domestic satellite facilities, or of leasing transponders under tariff from Comsat or any other carrier who elects to proceed solely as a carrier's carrier (paragraph 22).

d. Comsat would be required to elect between pursuing its multipurpose application or serving AT&T. If it elected to serve AT&T, Comsat would be required to operate exclusively as a carrier's carrier pursuant to tariff offerings and to provide some capacity for use by carriers other than AT&T (paragraph 23).

e. In the event Comsat should elect to proceed other than as a carrier's carrier, it would be prohibited from owning or operating domestic satellite facilities at any overseas point served by INTELSAT facilities (paragraph 26).

f. AT&T and other terrestrial carriers seeking domestic satellite authorizations would be required to submit for Commission approval, prior to action on their applications, a description of the kinds of interconnection arrangements they will make available to other domestic satellite system or earth station licensees (paragraph 34).

3. The *Second Report* also adopted policies relating to service to Alaska, Hawaii, Puerto Rico, and educational entities, which are under dispute in the instant pleadings. With the advent of service via domestic satellites, it would be Commission policy to integrate charges for services between Alaska, Hawaii and Puerto Rico and the contiguous 48 States into the domestic rate patterns (paragraphs 35–41). Toward this end (*id.*):

a. Domestic satellite applicants authorized to serve these points would be required, within six months from the issuance of the authorization, to submit a specific proposal for revised rates for MTT service for review and approval of the Commission prior to the commencement of service (paragraph 37).

b. Record carriers now serving these points would be required to submit a proposal for integration within the same time frame (paragraph 38).

c. AT&T would provide MTT service via domestic satellites to these three points, in conjunction with the appropriate local carrier, with a possible exception for GTE Satellite Corporation (GTE)[2] in the case of Hawaii in the event GTE makes certain showings to justify authorization of its proposed system (paragraph 39).

d. Alaska, Hawaii and Puerto Rico would be afforded an opportunity to obtain specialized services via the same satellites and

[2] Since the *Second Report*, GTE Service Corporation and the GTE operating companies seeking domestic satellite authorizations have transferred their applications to a newly formed corporation, GTE Satellite Corporation.

earth stations used for MTT service, without precluding the authorization of additional, independent domestic satellite facilities to provide specialized services to these points (paragraph 40).

e. The system authorized to provide interstate MTT service to Alaska would be required to afford access to the same system for intra-Alaska service, if desired (paragraph 41).

With respect to the terms of access to domestic satellite facilities by public broadcasting and other educational interests, the *Second Report* stated the Commission's willingness to entertain specific proposals by carriers or users for the prescription of preferential rate classifications, but declined to initiate any requirement as to common carriers or to enunciate any general statement of policy (paragraph 43).

4. It appears to us, upon reviewing the petitions for reconsideration and other pleadings, that the principal issues posed by the AT&T and Comsat petitions and by the Comsat/MCIL Memorandum of Understanding are interrelated and involve primarily the same portions of the *Second Report;* whereas other issues raised in their petitions, and in the petitions of the RCA applicants, the Network Project, NAEB and WUI, go to different policy determinations in the *Second Report.* The principal requests of the AT&T petition are that the Commission reconsider the conditions limiting its initial use of domestic satellites to particular services and disapproving the Comsat/AT&T lease arrangement. Comsat also challenges the disallowance of the Comsat/AT&T lease agreement, as well as the requirement that it elect between serving AT&T and other carriers as a carrier's carrier or serving entities other than AT&T on both a "retail" and "wholesale" basis as proposed in Comsat's multipurpose application. Comsat has further requested that its Memorandum of Understanding with MCIL be regarded as supplemental information to its petition for reconsideration, and has indicated that Commission approval of that proposal may moot some issues in its petition. Under the Memorandum of Understanding, MCIL reserves the right to terminate in the event that the Commission grants that portion of AT&T's petition challenging the initial limitation on the service it may provide via domestic satellite. Accordingly, we will first address these aspects of the AT&T and Comsat petitions and related pleadings, and then turn to the petitions of others and the remaining questions raised by AT&T or Comsat.

I. AT&T's Initial Use of Satellites, The Comsat/AT&T Lease Agreement, The Comsat Election Requirement, and The Comsat/MCIL Memorandum of Understanding

A. PLEADINGS OF THE PARTIES

1. AT&T, Comsat and MCIL

5. *AT&T* urges that the condition limiting its initial use of domestic satellites to specified services (MTT, WATS, AUTOVON, emergency restoration in the event of terrestrial outage and possibly other serv-

ices in the case of Alaska, Hawaii and Puerto Rico) is unsupported by the record, unsound as a matter of policy, and contrary to the Commission's decision in *Specialized Common Carrier Services*, 29 FCC 2d 870. It sees no basis for the concerns expressed in paragraphs 9–12 of the *Second Report* and claims that considerations of this nature would not, in any event, justify the restriction. AT&T also asserts that the limitation would unnecessarily fragment the network function, inject unnecessary costs by requiring AT&T to segregate the segment of private line services eligible for satellite transmission from ineligible services, and deny the public the benefits of full integration of domestic satellites into the nationwide network. AT&T further states that there is no rational basis for singling out only one government system, AUTOVON, from other essential private line government services, and that it should, in any event, be authorized to provide any United States Government private line service by means of its initial domestic satellite system.

6. Both *AT&T* and *Comsat* urge that their lease agreement should not be rejected. AT&T claims that the rejection is without justification and that the Commission should permit any applicant, including AT&T, to determine for itself the appropriate means of providing its domestic satellite system. Comsat claims that the disallowance of the agreement constitutes a severe penalty for it, without adequate justification, and that no other system applicant has been treated so harshly. To the extent that this action was affected by AT&T's stock ownership in Comsat and ability to elect three members of Comsat's Board of Directors, Comsat deems such concern to be baseless. In any event, it asserts that restrictions on Comsat are ineffective and inappropriate to deal with a situation over which Comsat has no control. There is also, Comsat asserts, no basis for concern that the agreement would restrain it from competing vigorously in the specialized market, contrary to its own self-interest, or that revenues from the lease would give it an advantage over other domestic satellite entrants.

7. *Comsat* further urges that the *Second Report* unnecessarily weakens competition and "artificially divides the market available to competitive suppliers of satellite services by forbidding anyone who serves AT&T (the largest part of the carrier portion of the market) to serve also the retail or specialized services market." It claims that, if permitted to function without this restriction, Comsat would be a most energetic competitor to AT&T and would not squeeze out potential competition from future entry. Comsat asserts that the tariff alternative is illusory because AT&T would probably opt for system ownership in preference to turning to a carrier's carrier offering tariffed services to AT&T and other carriers. Comsat further alleges that it has no reasonable chance of attracting the business of other carriers in view of the stated intentions of Western Union and GTE in response to paragraph 45(b) of the *Second Report*.

8. According to *Comsat/MCIL* their Memorandum of Understanding, as supplemented by the Agreement of October 3, 1972,[3] contem-

[3] The Agreement was negotiated by Comsat, Lockheed Aircraft Corporation, MCI Communications Corporation, MCI Satellite, Inc. and MCI Lockheed Satellite Corporation.

plates a joint enterprise to establish and operate a multipurpose domestic satellite system. This would be accomplished, subject to Commission approval, through a restructured and renamed MCI Lockheed Satellite Corporation owned jointly and equally by Comsat, MCI Satellite, Inc., and Lockheed Aircraft Corporation. New cash in the total amount of $1,750,000 would be contributed by Comsat ($750,000), Lockheed ($500,000) and MCI Satellite ($500,000) to cover foreseeable pre-operating expenses of the new Corporation. When the funding requirements of the construction phase are known, the management and directors of the jointly held Corporation would determine the nature of the necessary financing. The Agreement provides for a 16 member Board of Directors. Each of the three stockholders would elect four directors, and all of the stockholders unanimously would elect four independent directors. In order to assure that major decisions of the joint enterprise could not be vetoed by one of the three stockholders or affirmatively forced by any two stockholders, the Agreement provides that the vote of 11 directors is required for specified major matters and a majority vote for other matters. However, notwithstanding that provision, a majority of the whole Board, exclusive of all "interested directors" elected by affected stockholders, is required to authorize any contract or transaction (including the issuance, reacquisition or redemption of any securities of the Corporation) between the Corporation and any entity owning 10% or more of the outstanding stock of the Corporation.[4]

9. The stockholders would have *pro rata* preemptive rights in any new issues of securities. The Corporation and the stockholders would have successive options to purchase at book value the interest of a stockholder who wishes to dispose of its equity.[5] This requirement would be binding for two years or until a public issue of securities, whichever came first. The Agreement would terminate in 5 years, or on the effective date of a registration statement or a public issue of securities, whichever is earlier.

10. In pertinent essence,[6] the Memorandum of Understanding makes the obligations of the parties contingent upon Commission approval

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[4] We note that the major matters requiring 11 votes are (Bylaws annexed to the Agreement, Articles II and III): (i) election of the chief executive officer of the Corporation; (ii) approval of the capital budgets of the Corporation and any capital expenditures that would materially exceed previously approved budgets; (iii) financial plans, including any security offering and mortgage or pledge of Corporation property in excess of $100,000; (iv) declaration of any dividend or return of capital on any shares of the Corporation's capital stock; (v) authorization of the redemption, re-acquisition or retirement of any securities of the Corporation (except as required pursuant to the terms of any such security); and (vi) approval of the configuration and design of any system of communications satellite facilities, including without limitation earth stations, to be established and operated by the Corporation, but not including subsystems or components of any such system. See also, Articles IV and V of the Bylaws relating to the powers of the executive Committee and the officers of the Corporation.

[5] The Agreement states in this respect that if the Corporation elects to purchase none or less than all of the securities of the selling stockholder, then other stockholders have the option to purchase all or any part of their respective *pro rata* shares of the securities of the selling stockholder. If the Corporation and/or the remaining stockholders do not exercise their successive options within 120 days, the selling stockholder may otherwise dispose of the securities.

[6] Both Comsat and MCIL reserve the right to pursue their pending applications in the event the proposed joint venture is not approved by the Commission or is terminated for other reasons, and MCIL reserves the right then to oppose the Comsat multi-purpose application. Various provisions in the Memorandum of Understanding relating to the rights of the parties should they fail to reach agreement, now appear moot in light of the Agreement filed on October 3, 1972.

of the Comsat/AT&T lease agreement appended to the latters' applications for domestic satellite facilities. If the Comsat/AT&T applications are granted and the proposed joint venture is allowed, the parties will request dismissal of the Comsat multi-purpose application and such portions of the Comsat petition for reconsideration as are moot, as well as a grant of the MCIL application as modified to reflect the proposed restructuring. The parties will also request the Commission to hold that the limitation precluding Comsat participation in services or facilities at overseas domestic points served by INTELSAT facilities is no longer relevant. In the event that the Commission should decline to approve the Memorandum of Understanding and supplementary Agreement as consistent with the policies underlying the *Second Report* or to waive any variances, the Memorandum of Understanding would be null and void. MCIL reserves the right to terminate the Memorandum of Understanding if the Commission should grant AT&T's request for reconsideration of the service limitation on its initial use of satellites.

11. In a statement submitted on September 8, 1972 with the Memorandum of Understanding, *MCIL* set forth arguments in support of its view that the objectives stated in paragraph 7 of the *Second Report* (35 FCC 2d at 846) would be promoted by the Comsat/MCIL proposal. It is asserted that "the coalescence of know-how and expertise represented by Comsat in space communications operations, by MCI in marketing specialized services and by Lockheed in advanced space technology would 'maximize the opportunities for the early acquisition of technical, operational and marketing data and experience in the use of this technology as a new communications resource for all types of services.' " This in turn would allegedly afford an "excellent opportunity for a strong, new and independent entity 'to demonstrate how any operational and economic characteristics peculiar to the satellite technology can be used to provide existing and new specialized services more economically and efficiently than can be done by terrestrial facilities' " (*id.*). MCIL further claimed that the restructuring would result in a corporate entity with a life of its own, under independent management, with no single owner in a position to dominate corporate or management decisions. As a consequence, MCI stated, "any restraints and inhibitions which some may fear Comsat suffers as a consequence of AT&T's minority equity position in Comsat and the business relationship that exists, or will exist, between the two are virtually eliminated by the circumstances of Comsat's minority position in MCIL" and the Commission's objective (c) would be served (35 FCC 2d at 847). With respect to the Commission's objective (d), it is asserted that the Comsat/MCIL proposal would "in no way derogate the 'leeway and flexibility' the Commission proposed to retain in the *Second Report*" (*id.*).

12. In addition, MCIL urged that the proposal would serve the more specific policies enunciated in paragraphs 8–11 of the *Second Report* (35 FCC 2d at 847–848) and eliminate the necessity for some of the conditions imposed by a then divided Commission in paragraphs 13, and 22–26 thereof (35 FCC 2d at 848–849, 852–853). In claiming

that the concern about AT&T expressed in paragraphs 9–11 of the *Second Report* would be "greatly eased" by the proposal, MCIL stated:

> The proposed ownership structure of MCIL bars AT&T from influence over MCIL operations. The restrictions of paragraph 21 of the Second Report, which MCIL urges must be maintained, excludes AT&T's presence in the satellite specialized services market for the present and thus eliminate the problems of cross-subsidy discussed in paragraphs 10–11 of the Second Report.

Noting further that the conditions adopted in paragraphs 13, 22–26 of the *Second Report* were based on the proposals then pending before the Commission (i.e., the ownership and operation by Comsat of the space segment portion of a satellite system dedicated to the exclusive use of AT&T and the ownership and operation of a multi-purpose system by Comsat for other carriers and users), MCIL asserted that the current Comsat/MCIL proposal, if approved, would constitute a significant change (i.e., the multi-purpose application of Comsat will be dismissed and Comsat would assume a minority position in MCIL). To the extent that the Commission, in paragraph 14 of the *Second Report* (35 FCC 2d at 849), found reinforcement for these conditions in the equity ownership position of AT&T in Comsat, MCIL claimed that the current proposal legally and practically insulates the restructured MCIL applicant from any inhibitions or restraints that might otherwise carry over from that relationship. Finally, MCIL urged that the restriction in paragraph 26 of the *Second Report*, prohibiting Comsat from owning or operating domestic satellite facilities to provide "retail" services at any overseas point served by INTELSAT, should be eliminated because the concern as to a potential conflict of interest by Comsat would be diluted to insignificance if its interest were reduced to that of a minority participant in an independent domestic system.

2. Comments of other parties

13. AT&T's request for reconsideration of its initial service limitation was opposed by *RCA Global Communications, Inc.* and *RCA Alaska Communications, Inc.* (the RCA applicants); *Fairchild Industries, Inc.* (Fairchild); *Western Union International, Inc.* (WUI) and *Western Telecommunications, Inc.* (WTCI). In its statement filed on September 8, 1972 in response to paragraph 45 (b) of the *Second Report*, MCIL also stated that it regards this limitation as "essential to the undertakings proposed in its application and the [Memorandum of] Understanding." These parties claimed that AT&T is reiterating arguments previously advanced and well known to the Commission. They further urged that the *Second Report* sufficiently sets forth the policy considerations underlying this condition, which they deem to be sound and necessary in the public interest to afford a reasonable opportunity for entry by others to offer specialized communications services via domestic satellite facilities. While all such parties supported retention of this condition,[7] WUI made the additional argu-

[7] ITT World Communications, Inc. (ITT Worldcom) and All America Cables and Radio Inc. (AAC&R) also filed comments generally supporting the *Second Report*, with specific comments on other aspects of the AT&T and Comsat petitions.

ment that it would be preferable to delete the exception for AUTO VON. These same parties also oppose those portions of the AT&T and Comsat petitions for reconsideration that challenge the disallowance of the Comsat/AT&T lease agreement, on substantially similar grounds.

14. In their initial comments on the Comsat/MCIL Memorandum of Understanding, which were filed on September 26, 1972 before the supplementary Agreement of October 3, 1972 was submitted, various parties urged that the Memorandum was contingent on reaching an unknown agreement, and did not afford any adequate basis for a decision by the Commission or for comments by the parties. By Order issued on October 11, 1972 (FCC 72–903), the Commission afforded interested parties an opportunity to submit comments and reply comments on the October 3 Agreement supplementing the Comsat/MCIL Memorandum of Understanding. The principal contentions on the merits are as follows.

15. *AT&T* has no objection to Commission consideration of the Memorandum of Understanding and supplemental Agreement, and expresses no views on the merits of these undertakings. However, it expressly adheres to its request for reconsideration of the condition limiting its initial use of domestic satellites to particular services and the condition disallowing the Comsat/AT&T proposal, and urges that these questions be resolved on their merits without being delayed or otherwise affected by the Comsat/MCIL proposal.

16. The *RCA* applicants, *Fairchild*, *American Satellite Corporation* and *WUI* are opposed to approval of the Comsat/MCIL proposal and urge that the Memorandum of Understanding and supplemental Agreement do not obviate the considerations underlying the conditions imposed in the *Second Report*. Specifically, it is asserted that the Agreement does not assure that Comsat will not become the dominant partner in view of its experience in INTELSAT and financial resources, as compared to MCI and Lockheed, and its position to influence Lockheed through Comsat's procurement powers in both the international and domestic satellite fields.[8] Under the Agreement (Bylaws, Article III, Section 9), they point out, the Corporation's financial plans and the system configuration and design are left for future decision by the Board of Directors, and hence are presently unknown to the Commission. Moreover, they claim that the provisions for preemptive rights in new or additional securities issues and for transfer of stockholder securities (Agreement, Sections 4 and 5), do not assure that Comsat would not ultimately emerge as the dominant stockholder. The provisions relating to the selection of directors and voting (Agreement, Section 7 and Bylaws, Articles II, III and IV) allegedly do not afford an adequate safeguard because the so-called independent Class B directors (and possibly even the directors selected by Lockheed or MCI might have to accommodate Comsat's private interests in order to avoid an operational stalemate, or might be influenced by Comsat's experience and talent reservoir or its procurement powers

[8] The RCA applicants note that Comsat's initial one-third ownership is greater than the AT&T ownership in Comsat.

for the INTELSAT and proposed AT&T system. Further, while the Agreement makes no representation as to whether a public offering is intended or not, virtually all of the restrictive provisions would disappear in the event of a public offering (Agreement, Section 5 (g) and Section 9).

17. These parties urge that no justification has been shown for departing from the conditions imposed on Comsat by the *Second Report*. The RCA applicants claim that the Commission now lacks sufficient information to approve the Comsat/MCIL proposal, and that even with a minority interest the alleged Comsat conflict of interest with its role in INTELSAT would remain at off-shore domestic points (see *Second Report*, paragraph 26). Fairchild and WUI argue that the disallowal of the Comsat/AT&T lease agreement should stand and that Comsat must be prohibited from engaging in the dual role of retailer, including off-shore operations, and wholesaler to AT&T.[9] Fairchild further alleges that the Comsat/MCIL arrangement could, without proper safeguards, have an adverse effect on future international satellite procurement, and requests the imposition of safeguards in this area.

18. Other parties commenting take miscellaneous positions. *Western Union* states that the questions raised by the Comsat/MCIL Agreement (e.g., composition of the applicant and Board of Directors, stock structure, and rights of positive and negative control) are matters that are ordinarily considered in the course of processing and acting on the application, and should be deferred to that stage. It further supports the policies and procedures of the *Second Report*, and comments that the Comsat/MCIL proposal seems like evidence of the anticompetitive tendency which the Commission foresaw when it prescribed limitations on Comsat in the *Second Report*. The *State of Alaska* expresses concern that if a new corporation supplants Comsat in the multi-purpose domestic field, there may be a shift in attitude toward service in Alaska. However, the State urges favorable consideration of the proposal, because it believes its interests would be best served by the possibility of a continuing commitment from the new corporation (in the event the Commission is unwilling to reconsider its limitation on Comsat service to off-shore points) and because the design of the Corporation appears fairly to meet the Commission's earlier objection. *Hughes* has no objection to a delay in resolving the ultimate roles of AT&T, Comsat and MCIL in the domestic satellite field, so long as the Hughes/GTE role can be determined at the same time. *Data Transmission Company* (Datran) asserts that the Comsat/MCIL proposaal does not ameliorate all of the Commission's reservations concerning the Comsat/AT&T system, particularly the conclusion that if Comsat were to serve AT&T it must operate exclusively as a carrier's carrier and serve all carriers indiscriminately.

[9] In this connection, Fairchild asserts that the Comsat/MCIL proposal gives rise to a greater need for barring any dual role. Otherwise, it is claimed, the ability of other applicants to compete would be seriously impacted by the circumstance that Comsat's investment in multi-purpose operations would be lessened while it continued to derive benefits from its private arrangement with AT&T and possibly shared them with only one of the competitors for the specialized service market, MC

Since approval of the Comsat/AT&T lease agreement would effect a reduction in the options available to terrestrial carriers, the Commission should first ascertain whether there is adequate assurance that satellite capacity will be available to terrestrial carriers other than AT&T on a fully non-discriminatory basis. The *Corporation for Public Broadcasting* (CPB) and the *Public Broadcasting Service* (PBS) comment that there appears to be a commitment on the part of the parties to the joint venture that the restructured Corporation would prosecute the pending MCIL application, and specifically that the present MCIL proposal for service to public broadcasting would remain an obligation of the newly constituted applicant. On that basis, PBS has no objection; however, if the parties to the joint venture have a different view, they should state their position at this time and CPB and PBS should be afforded an opportunity to comment on the question.

3. Replies of MCIL and Comsat

19. In reply to the contention that Comsat, by virtue of its alleged superior financial position and its satellite operating experience, would inevitably achieve dominance of the restructured MCIL Corporation even though the parties and the Commission intended otherwise, *MCIL* asserts that the provisions of the Agreement governing the election of directors and voting will accomplish the purpose of independence. With this structure, MCIL contends, no single shareholder could control decisions made in vital matters except with the concurrence of both other stockholders or of another stockholder and at least 3 of the Class B directors. MCIL further urges that under the provisions affording preemptive rights to the stockholders with respect to any securities involving voting rights, every stockholder has the right to, and the capability of, avoiding dilution of its interest and control vis-a-vis any other shareholder and of preventing the issuance of any securities of the Corporation which would cause a shift in the control of the Corporation. MCIL sees no merit in the argument that regardless of the manner in which the Corporation is structured, MCI and Lockheed will be unable to exercise their rights in a manner that would avoid *de jure* or *de facto* control by Comsat at some time in the future. Apart from the asserted intent of MCI and Lockheed to the contrary, any future changes that might lead to such a result could not be accomplished without prior written consent of the Commission pursuant to Section 310(b) of the Communications Act. Thus, MCIL takes the position that this is not a speculation with which the Commission must deal at this stage.

20. With respect to the contention that the reframed Comsat/MCIL proposal does not obviate the anti-competitive concerns set forth in the *Second Report*, MCIL asserts that the danger the Commission sought to avoid by the election requirement is negated by the fact that, under the management structure, Comsat alone will not and cannot control the retail marketing decisions of a multi-purpose system in which it holds a minority interest. Moreover, under the proposal any

threat of a Comsat advantage over others by virtue of revenues from the Comsat lease agreement would be eliminated because the Corporation would not receive these revenues. Though such revenues may constitute resources that Comsat could use for capital contributions to the Corporation, MCIL notes this situation pertains to every domestic satellite applicant whose stockholders have other profitable businesses through which they are able to make capital available to domestic satellite undertakings.

21. In requesting Commission approval of the proposal, MCIL states that Comsat/MCIL is not seeking complete and final approval of the technical and financial qualifications of the Corporation, but rather a determination on threshold policy issues. It notes that the technical parameters of the system and the financial plans of the restructured MCIL applicant will be known by the time of, and can be treated in connection with, the Commission's consideration of whether the necessary authorizations should be issued. However, contrary to the contention of Western Union, MCIL urges that a resolution of the policy questions should not be deferred to processing of the applications, which would allegedly place Comsat and MCIL in an inequitable position vis-a-vis other applicants.

22. On November 13, 1972 *Comsat* submitted its reply to comments on the Comsat/MCIL Agreement, together with a motion for acceptance of late filing which is hereby granted. Comsat states that: Under our policy of open entry, the Commission has in effect relied upon the forces of competition to ameliorate the potential harmful effects and should not now impose artificial restrictions which would eliminate the most effective potential entrants. Any attempt by one of the three shareholders to weaken the Corporation's competitive ability in order to foster external private interests, such as a reluctance to compete with other terrestrial facilities or desire to favor a particular hardware supplier regardless of cost and quality, would redound to the detriment of the Corporation and the other two stockholders and is therefore unlikely to succeed. While Comsat does not anticipate that each of the three partners in the Corporation would entirely ignore its own self-interest, it urges that the Agreement has taken more steps than any other applicant (such as the RCA applicants) to reduce potential conflicts of interest. The necessity to accommodate the widely divergent interests of Comsat, MCI and Lockheed within the framework of the proposed corporate structure that has been established would tend to promote decision-making independence. Comsat further asserts that the comments of other parties challenging the effectiveness of the safeguards in the Agreement are not well-founded. In any grant of applications the Commission can retain jurisdiction to assure that the representations of the Comsat/MCIL applicant are honored.

23. Specifically, with respect to Fairchild's request for safeguards to prevent an adverse impact on future international procurement competition, Comsat states that even if it were disposed to abuse its fiduciary responsibilities to INTELSAT, the procurement regulations of INTELSAT and its process for review and evaluation of proposals afford a sufficient safeguard. In any event, the mere fact that Lockheed

is a participant in the domestic Corporation would not provide sufficient incentive for Comsat to compromise the interests of INTELSAT, and its own very substantial investment therein, by attempting to influence the procurement of a spacecraft that was not the best available in terms of price and technical quality. Comsat is also opposed to Western Union's suggestion that consideration of the Comsat/MCIL Agreement, and a ruling on its consistency with the Commission's policy objectives, be deferred to the application processing stage.

B. DISCUSSION AND CONCLUSIONS

1. Service limitation on AT&T's initial use of satellites

24. Turning first to AT&T's request for reconsideration of the condition in the *Second Report* limiting its use of domestic satellites to specified services, we agree with AT&T's contention that this issue must be considered on its merits without being affected by the Comsat/MCIL proposal or MCIL's reservation of the right to terminate the Memorandum of Understanding in the event AT&T's request should be granted. While Comsat may seek dismissal of issues raised in its own petition for reconsideration, neither Comsat nor MCIL can waive AT&T's right to pursue its petition for reconsideration of this challenged limitation.

25. On the merits, we are of the opinion that AT&T has not shown any sufficient reason for granting reconsideration of this condition in the public interest except with respect to private line services provided to the Federal Government. The exception for AUTOVON was made in the light of comments by the Department of Defense in response to our *Memorandum Opinion and Order* issued herein on March 17, 1972 inviting comments on the staff recommendation (34 FCC 2d 1, 2, 8, 51–53). Although the Department of Defense did not seek any exemption for other private line services to the Federal Government, we are persuaded by the arguments made in paragraphs 10–11 of AT&T's petition for reconsideration that the condition should be modified to permit AT&T to use any domestic satellite facilities authorized for its use to provide all United States Government private line services. In addition to the circumstance that there are many such services besides AUTOVON which are at least as vital to the national defense and security, private line services to the United States Government are peripheral to the kind of specialized service markets the *Second Report* was seeking to afford the competitive domestic satellite entrants a reasonable opportunity to develop (35 FCC 2d at 847–848, paragraphs 9–12).

26. In all other respects, we think that AT&T is merely reiterating arguments made prior to the *Second Report*, in its written comments and in the views expressed by other parties, and that such arguments do not call for a different conclusion upon reconsideration. We adhere to the considerations and conclusions set forth in paragraphs 4–12, and 21 of the *Second Report*, with the exception discussed above and the following amplification.

27. AT&T's assertion that this initial limitation would artificially and unnecessarily fragment the network function, inject unnecessary costs by requiring it to segregate eligible from ineligible services for purposes of satellite transmission, and deny the public the benefits of full integration of domestic satellites into the nationwide network, is unsupported by cost data or other factual detail. We note that AT&T does not contend that it is impracticable to segregate the services, or that the cost is such as to affect significantly its revenue requirements applicable to its public offerings of service. The *Second Report* adequately treats the policy foundation for this initial condition which is subject to reexamination no later than three years after AT&T commences domestic satellite operations.[10] Moreover, AT&T has consistently maintained that while the pending proposal for its first venture in domestic satellites utilizing 4 and 6 GHz frequencies offers certain operational advantages and an opportunity for experimentation—which justify the conceded costs in excess of utilizing terrestrial facilities only, its principal interest in the domestic satellite technology lies in the potential afforded by the large number of frequencies allocated for communications satellite use higher in the spectrum (see *Second Report*, paragraph 3; 34 FCC 2d at 18, 51). We do not yet have any application of AT&T for use of the higher frequencies and hence cannot predict whether the initial service limitation will have been reexamined and/or modified before AT&T seeks to commence domestic satellite operations on any more substantial basis.[11] However, since the opportunity for reexamination of the initial limitation in the light of then prevailing conditions comes in a relatively short time, we fail to see how the limitation could operate to deny the public any benefits to be derived from full integration of domestic satellites into the nationwide network of AT&T over any significant period. In any event, in our judgment, the public benefits to be anticipated from this initial limitation—in the form of an enhanced opportunity for other domestic satellite entrants to develop the competitive specialized markets and for users to have "a wider range of choices as to how they may best satisfy their expanding and changing requirements for specialized communication service" (*Specialized Common Carrier Services*, 29 FCC 2d 870, 909–910)—outweigh any inconvenience to AT&T as well as its bare assertion of temporary drawback to its customers.

28. With respect to AT&T's further contention that the initial service limitation is contrary to the policies adopted in *Specialized Common Carrier Services* and other Commission precedent and beyond the Commission's authority, we note the following. As reflected in paragraph 12 of the *Second Report* (35 FCC 2d at 848), we consider the measure adopted there—toward the end that competitive entry is a

[10] While AT&T renews its previous contention that it does not presently intend to offer satellite only services or to depart from terrestrial tariffs, we think that the three-year limitation affords greater assurance of a fixed grace period to domestic satellite entrants seeking to serve the specialized markets than a statement of "present" intentions that is subject to change at the discretion of AT&T.

[11] However, even assuming that any such application for use of the higher frequencies should be forthcoming and processed in time for the facilities to become operational prior to reexamination of the service limitation, we are of the view that the initial three-year limitation is nevertheless warranted in the public interest.

meaningful reality in the high capacity satellite field—to be reasonable and compatible with our decision in *Specialized Common Carrier Services*, which stressed that "our policy determination as to new specialized carrier entry terrestrially, does not afford any measure of protection against domestic communications satellite entry or otherwise prejudge our determination in Docket No. 16495 as to what course would best serve the public interest in the domestic satellite field" (29 FCC 2d at 920).[12] We further believe this initial limitation to be well within our authority under Sections 4 (i) and (j), 214, 303 and 307–309 of the Communications Act, and consonant with Section 313(a) of the Communications Act and the policies underlying the antitrust laws. For example, we have previously exercised similar authority in connection with the authorization of the TAT IV cable to enhance the potential for competition among international carriers (*American Telephone and Telegraph Company*, 37 FCC 1151, 1158–1160 (1964)). See also, the authority conferred by Section 303(b) of the Communications Act to: "Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class" as "public convenience, interest or necessity requires"; and innumerable Commission actions prescribing the nature of the service to be provided by various classes of stations, including those licensed to miscellaneous domestic common carriers (e.g., Sections 21.705, 87.181, 91.2, 93.2, 95.83, and 74.431, 74.531, 74.631, 74.731, 74.831, 74.931, and 74.1231 of the Commission's Rules and Regulations).

29. Concerning the question of removal of the limitation, we have set forth the two occurrences when this will be considered (see paragraph 21, *Second Report*). We cannot now prejudge the action a future Commission may find necessary to protect the public interest. But we can delineate the appropriate burdens of the interested parties and a time table for decision. The burden should not be upon AT&T to prove a negative—that its unconditional use of satellite facilities for competitive services will not adversely affect other carriers' domestic satellite undertakings in such a way as to run counter to the public interest. These other carriers are in the most appropriate position to advance any claim of adverse impact affecting the public interest, and the burden is upon them to come forward with a detailed, convincing showing for the continuation of this limitation upon AT&T, to which showing AT&T will be afforded an opportunity to respond. Further, the decision on any AT&T request to end this condition should not be delayed for a substantial time period, so that in practical effect—simply because of a delay in administrative procedures—the three-year initial or "grace" period becomes four, five or six years. Accordingly, we specify that the limitation shall end at the earliest of the following occurrences: (a) upon a finding by the Commission that domestic satellite licensees authorized to offer specialized common carrier services have achieved substantial utilization of their satellite capacity;

[12] Nor do we see any inconsistency between the *Second Report* and our decision on reconsideration in the *Computer Inquiry* (Docket No. 16979), 34 FCC 2d 557, which confirmed the Commission's jurisdiction to adopt the restrictions there imposed on non-AT&T carriers eligible to engage in data processing services.

or, in any event, (b) upon the expiration of a three-year period after the commencement of domestic satellite operations by AT&T unless the Commission acts to extend the limitation upon consideration of a petition filed by an interested party at least six months before the expiration date. In either of the above two circumstances, however, removal of the limitation will depend upon whether the AT&T/Comsat ownership issue (see following discussion) has been satisfactorily resolved, either through divestiture by AT&T of its stock ownership in Comsat or approval by the Commission of an acceptable plan for such divestiture.

30. Thus, there is one burden that AT&T will be expected to meet as part of any request to use its satellite facilities for competitive specialized services—and that is a showing of elimination of the basic problem which stems from the inter-relationship between AT&T and Comsat represented by AT&T's part ownership of Comsat. It is our view that such interlocking arrangements are not compatible in the long term with the type of competitive environment in the domestic satellite communications that our policies in this and related proceedings (e.g., *Specialized Common Carrier Services*, 29 FCC 2d 870) seek to create and maintain. This concern is exacerbated by the proposed inter-relationship between Comsat and MCI, considering MCI's competitive posture vis-a-vis AT&T in terrestrial leased-line services.

31. When the Satellite Act was enacted, Congress, in order to assure that the fledgling corporation—Comsat—received needed communications expertise and guidance, made provision for communications common carriers to own up to 50% of Comsat stock and to elect six members of Comsat's Board of Directors. Pursuant to this provision, AT&T acquired its 29% ownership in Comsat in 1964 and other carriers also acquired substantial interests.[13] Comsat was created by Congress primarily for the important and immediate purpose of representing and promoting this nation's interests in the establishment and operation, in conjunction with other nations, of a global international communications satellite system. That mission, with the aid and support of AT&T and other carriers, has been achieved with a high degree of success. Comsat is now seeking entry into the domestic communications field to compete with AT&T and other carriers in supplying new and improved domestic communications services. However, in this field the underlying considerations which motivated Congress to permit and encourage AT&T's ownership in Comsat are no longer controlling. On the contrary, the competitive roles which Comsat and AT&T are assuming in the domestic communications field dictate the need for maximum independence from each other and an arms-length relationship.

32. Consideration of Comsat's current posture in the international arena does not override the foregoing conclusion. For conditions have changed markedly from 1964 and stock ownership by AT&T in

[13] The right of any carrier to own stock was not intended by Congress to be an absolute right. Rather, only those carriers authorized by the Commission upon a finding that their ownership would be consistent with the public interest could become stockholders (see Section 304(b) (1) and (2) of the Satellite Act). The FCC issued the appropriate authorization to AT&T on April 29, 1963.

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Comsat is no longer necessary to further the policies of the Communications Satellite Act. Since that time, Comsat has developed its own expertise and is a viable entity in its own right, thus obviating the need for the internal guidance and assistance of AT&T and other carriers. Furthermore, the Congress has recognized the diminution, with time, of the importance of carrier participation in the internal affairs of Comsat. Thus, in 1969, Congress amended the 1962 Satellite Act [14] to provide that carrier representation on the Comsat Board of Directors will be proportionate to the amount of stock they collectively own in Comsat, as contrasted with the original Act which provided for six carrier directors regardless of the amount of carrier stock ownership. The major carriers, with the exception of AT&T, have all divested themselves of their shareholdings with the result that only AT&T is now eligible to nominate and elect carrier directors and, in fact, there are currently only three carrier directors on the Comsat Board, all of whom represent AT&T.

33. In light of the foregoing considerations, we believe that AT&T has the burden of showing that it has either wholly eliminated the problem stemming from stock ownership in Comsat or is well on its way to doing so in accordance with a plan of divestiture approved by the Commission. That is the only burden of proceeding that we impose upon AT&T, in connection with removal of the limitation in question. We will, of course, consider appropriately filed pleadings of interested persons in response to any request of AT&T with respect to this matter.

2. The Comsat/AT&T lease agreement and the requirement of the Second Report *that Comsat elect between roles*

34. The Memorandum of Understanding between Comsat and MCIL and the supplementary Agreement have a direct impact on the basic reasons for our requirement in the *Second Report* that Comsat elect between operating exclusively as a carrier's carrier for AT&T and others pursuant to tariff or pursuing its multipurpose application. Accordingly, we deem it appropriate to take this into account in determining whether we should grant the requests of AT&T and Comsat for reconsideration of the disallowal of their lease agreement in the *Second Report* and Comsat's request for reconsideration of the aforementioned election requirement. For, if we decide that the Comsat/AT&T lease agreement, the applications predicated thereon, and the applications of the restructured MCIL Corporation should be accepted for processing in the present circumstances,[15] it may be unnecessary to reach the question of whether reconsideration is warranted for the reasons stated in the AT&T and Comsat petitions for reconsideration. Comsat has represented that it would dismiss these portions of its petition in the event of a favorable Commission decision on the lease agreement and on its proposal to proceed in dual roles

[14] 47 U.S.C. 733.

[15] We are not, of course, in a position—prior to the processing of perfected applications—to make any determination as to whether the pending Comsat/AT&T applications or any future applications incorporating the Comsat/MCIL proposal should be granted.

now before us. AT&T has not sought reconsideration of the Comsat election requirement and will not be prejudiced if the relief it seeks as to the lease agreement is granted, albeit on grounds asserted by others.

a. The Comsat/MCIL proposal

35. A combination of MCI, Lockheed and Comsat would bring together some of the basic elements that are conducive to the likelihood of the successful provision of communication common carrier services via domestic satellites. It would coalesce in one stronger applicant the retail marketing know-how of MCI, derived from its existing and proposed operations as a terrestrial specialized carrier; the technical talents of Lockheed as a major manufacturer of space hardware; and the considerable experience of Comsat in the international communications satellite field as manager of the INTELSAT system and as a carrier's carrier for United States authorized users, as well as the strengthening factor of Comsat's financial position. This in turn would promote achievement of our objectives: "to maximize the opportunities for the early acquisition of technical, operational, and marketing data and experience in the use of the technology as a new communications resource for all types of services" (*Second Report*, paragraph 7 (a)); "to afford a reasonable opportunity for multiple entities to demonstrate how any operational and economic characteristics peculiar to the satellite technology can be used to provide existing and new specialized services more economically and efficiently than can be done by terrestrial facilities" (*Second Report*, paragraph 7 (b)); to "afford an opportunity for access to the satellite technology by retail carriers who lack sufficient existing or potential traffic to warrant the investment required for ownership of space segment facilities" (*Second Report*, paragraph 24); and, in light of the predominant position of Hughes at this time in the field of commercial communications satellite procurement, to encourage "entry by different equipment manufacturers to demonstrate rival technologies" (*Second Report*, paragraph 19; *Memorandum Opinion and Order* issued on March 17, 1972 herein, paragraphs 84–86, 34 FCC 2d 1, 44–45). In our judgment, the addition of Comsat offers a more solid foundation for an early partial realization of these objectives through implementation of the tripartite proposed system than does either the MCIL application or the Comsat multi-purpose application, standing alone.

36. On the other hand, the contingencies upon which the Comsat/MCIL proposal is premised conflict on their face with the policy conditions adopted in the *Second Report* that bar consideration of the Comsat/AT&T proposal based on their lease agreement and require Comsat to elect between operating solely as a carrier's carrier serving AT&T and other carriers pursuant to tariffs or serving entities other than AT&T as a "retail" and/or "wholesale" carrier (*Second Report*, paragraphs 13–14, 22–23). Thus, the threshold question for present resolution is whether the Comsat/MCIL proposal constitutes such a significant change in circumstances as to substantially alleviate the concerns underlying those requirements and to warrant deletion or modification of such requirements upon reconsideration.

37. The nub of the dispute between the parties on this point seems to turn on the issue of the degree of potential Comsat influence over the restructured MCIL applicant. As previously indicated, the basic thrust of MCIL's position is that Comsat's minority participation in the new Corporation poses a situation fundamentally different from its multipurpose application, because the Corporation is so structured under the Agreement as to preclude dominance or control by any one of the three owners and to reduce to a minimum any restraints or inhibitions that might flow from Comsat's corporate and business relationship with AT&T or its roles in the INTELSAT system. Those challenging this position contend principally that the Agreement does not suffice to assure that Comsat would not in fact become the dominant partner because of its experience in INTELSAT, financial resources and procurement powers, or as a result of future changes in the initial stock ownership pattern.

38. Upon considering the Agreement in light of the contentions of the parties, we are persuaded that it constitutes a good faith endeavor by Comsat, MCI and Lockheed to structure an applicant in which all three could participate as equals, without placing any single owner in a position to control or dominate corporate or management decisions or depriving the Corporation of flexibility to make future decisions on the basis of evolving circumstances. With respect to the provisions of the Agreement relating to election of directors and voting on specified major matters and transactions between the Corporation and a stockholder (Agreement, Section 7 and Bylaws, Art. III–V), we think that Comsat/MCIL have been reasonably successful in achieving independent management—that is, "independent" in the sense that of being not subject to control by any one stockholder without the substantial concurrence of both other stockholders or at least one other stockholder and most of the Class B directors.[16] While Comsat's voice might be more influential to some directors because of its experience in INTELSAT and procurement powers, it could not join forces with Lockheed to compel action contrary to the views of MCI (or vice versa), unless it also succeeds in persuading at least three of the four Class B directors that such action is in the best interest of the Corporation.

39. The aspect of the Agreement giving rise to greater concern is the presently unknown nature of future management and/or stockholder decisions concerning financing and securities (new issuances, transfers, and/or a public offering). Though Comsat, MCI and Lockheed would each furnish pre-operational capital in approximately equal amounts, the Agreement leaves for future decision by the Board of Directors the plans for financing the system, including any security offering and mortgage or pledge of Corporation property in excess of

[16] We are not persuaded by the argument of the RCA applicants that these provisions afford each of the three stockholders such a degree of veto power as to make some accommodation of private stockholder interests a prerequisite to the Corporation's ability to act. The provision for 11 out of 16 director votes for major matters does not confer a veto power upon any one stockholder alone, though it requires a relatively high degree of unanimity among directors not elected by a particular stockholder for action contrary to the desires of that stockholder. See also, Agreement, Bylaws, Articles IV and V.

$100,000 (Agreement, Section 3; Bylaws, Art. III, Section 9(a)(iii)). Moreover, while Comsat, MCI and Lockheed would each own one-third of the initial stock of the Corporation (Agreement, Section 3), each such stockholder would have the pre-emptive right to subscribe for all or any part of its *pro rata* share of any new or additional securities issued by the Corporation (Agreement, Section 4); the Corporation and the stockholders would have successive options during a two-year initial period to purchase the interest of a stockholder wishing to dispose of its equity or of a bankrupt or breaching stockholder (Agreement, Sections 5 and 6); and the duration of the Agreement is only for five years or "until the day preceding the effective date of a registration statement under the Securities Act of 1933 relating to a public, underwritten offering of securities of the Corporation (whether such offering is made by the Corporation or by its stockholders, or both), whichever shall come first" (Agreement, Section 5(g)). As some parties point out, the Agreement does not preclude the possibility of an enhanced Comsat role due to, for example, a management decision to obtain all or a disproportionate part of future financing from Comsat, or an increased Comsat ownership interest, or *de facto* control by Comsat in the event of a public offering.

40. Further, apart from the Agreement, we see some basis for concern as to interlocking directorates and the possibility of conflicting fiduciary duties of directors. For example, MCI would probably disclose to the Corporation's Board of Directors its long range plans for utilizing terrestrial and satellite facilities and its marketing plans in the specialized field so that intelligent decisions could be made with respect to such matters as the location of earth stations, assignment of transponders and the breakdown of channels within transponders. Comsat's representatives on the Corporation's Board of Directors who became privy to MCI's plans would, in turn, be required to report to Comsat's Board of Directors on which three representatives of AT&T sit. Two of the present AT&T nominees on the Comsat Board are active officials in AT&T, one being a Vice-President of AT&T and President of the Long Lines Department, which would appear to be primarily charged with meeting potential MCI competition.[17] These corporate relationships give rise to the possibility that AT&T, through its representatives on the Comsat Board of Directors, would have some indirect influence on decisions of the Comsat/MCIL management or on decisions of the Comsat Board affecting the interests of Comsat/MCIL, as well as access to proprietary information of Comsat/MCIL and MCI.

41. In view of the foregoing uncertainties and potential conflicts of interest, we cannot conclude on the basis of the Agreement alone that Comsat's role in the restructured Corporation would actually be of such nature as to minimize any restraints that might flow from its corporate and business relationship with AT&T. However, it is not necessary to bar the Comsat/MCIL and Comsat/AT&T proposals

[17] Another of AT&T's nominees on the Comsat Board of Directors is a Vice-President and General Counsel of AT&T, and the third is a former Vice Chairman of the AT&T Board of Directors.

from further consideration on that ground,[18] for we can and will condition further implementation of those proposals upon the following requirements to safeguard the public interest.

42. First, since Comsat and MCIL have premised their request for approval of the presently proposed dual role by Comsat on the representation that Comsat would be a minority participant in the restructured MCIL Corporation, we will hold the Comsat/MCIL applicant to that standard for so long as Comsat provides, or proposes to provide, domestic satellite service to AT&T. As a prerequisite to any authorization, the Corporation will be required to show not only that it is financially qualified, but also that its financial plans are not in derogation of that standard, directly or indirectly, and that there have been no changes in ownership interest such as to affect the minority status of Comsat. Any grant will be upon condition that the Corporation obtain prior written consent from the Commission, whether or not required by Section 310(b) of the Communications Act, for any securities acquisition by the Corporation or the stockholders pursuant to Section 4 or Section 5 of the Agreement or any public offering that would increase directly or indirectly the ownership position of Comsat beyond 33⅓% or in any other way place it in a position where it could exercise *de facto* control.

43. Second, we will not grant any application for authorization under Section 212 of the Communications Act to permit any person holding the position of officer or director in AT&T to serve on the Comsat Board of Directors.[19] Since 1964 the Commission has approved, on an annual basis, applications for Section 212 authorization of interlocking relationships between AT&T and Comsat on the ground that the representatives nominated by AT&T were experienced officials whose expertise would benefit Comsat.[19a] In addition to Comsat's present lack of need for such expert assistance (*Second Report*, paragraph 14; 35 FCC 2d at 849), authorization of the Comsat/MCIL proposal would preclude us from finding that "neither public nor private interests will be adversely affected" by authorizing interlocking relationships between AT&T and Comsat (Section 212).

44. Third, we think it necessary to condition any approval of the Comsat/AT&T lease arrangement upon further requirements to mitigate the potential conflict of interest. The foregoing condition would not suffice to preclude AT&T from nominating to the Comsat Board of Directors other persons closely identified with AT&T's interests, such as former officers or directors or present or past employees of AT&T. Accordingly, the Comsat/AT&T lease arrangement will be approved only upon condition that any members of the Comsat Board

[18] Contrary to the suggestion of Western Union, we will not defer the threshold policy questions for resolution in the course of processing and acting on the applications. It appears more equitable and in the public interest to set forth now for the guidance of all applicants the conditions to which any grant would be subject.

[19] This condition is consistent with the provisions of Section 303 of the Communications Satellite Act of 1962, as amended in 1969 (47 U.S.C. 733). That Act does not require that members elected by AT&T need be officers or directors of AT&T, or override provisions of Section 212 of the Communications Act that are not inconsistent with the Satellite Act.

[19a] While the most recent authorization issued on April 14, 1972 by the staff under delegated authority was not specifically limited to one year, we do not construe that authorization as extending beyond the customary one year period.

nominated by AT&T shall be persons who do not have any present or past affiliation with AT&T; and that Comsat submit for Commission approval prior to authorization, a statement of the procedures that the Comsat Board of Directors will follow to avoid any participation by AT&T elected members in matters involving the Comsat/MCIL domestic satellite venture or disclosure to such members of confidential aspects of the plans and operations of that venture. These requirements in combination with the requirements for divestiture of AT&T's stock in Comsat described in paragraphs 29–33, *supra*, will in our judgment protect the public interest. The Commission will study whether further actions are required in this matter.

45. In this connection, we note that Comsat has not sought reconsideration of the requirement of the *Second Report* that it form a separate corporation to engage in any domestic satellite venture whether or not entailing service to AT&T (paragraph 26, 35 FCC 2d at 853). In light of the dual capacity in which Comsat now proposes to proceed, the Comsat/MCIL Corporation does not encompass the aspect of furnishing domestic satellite facilities for the use of AT&T. Moreover, the formation of a separate corporate subsidiary to engage in all domestic satellite activities of Comsat, including its participation in the Comsat/MCIL Corporation, will assist in separating such activities from Comsat's role in INTELSAT. Since such separate corporate subsidiary would not come within the provisions of Section 303(a) of the Communications Satellite Act of 1962 relating to the nomination of directors by AT&T, we anticipate that the Board of Directors for this separate corporate subsidiary of Comsat will not include any representatives of AT&T.

46. Finally, in agreement with the position of Comsat, we reject the argument of various parties that additional safeguards are necessary to avoid the possibility that Lockheed would be overly subject to influence by Comsat because of the latter's procurement powers for the INTELSAT system and for the proposed Comsat/AT&T system (see paragraphs 16–17, above). With respect to any procurement matter coming before the management of Comsat/MCIL the provisions of the Agreement and Bylaws relating to election of officers and voting afford a reasonably adequate assurance that the independent corporate interests of Lockheed and/or Comsat are unlikely to dictate management decisions contrary to the best interests of the Corporation (see paragraphs 38–42 above). Insofar as procurement for the INTELSAT system and the proposed Comsat/AT&T system is concerned, we think that INTELSAT and AT&T are in the best position to protect their own interests.[19b] Significantly, Hughes, which has a record of being the predominant supplier of spacecraft to INTELSAT, has not objected to the Comsat/MCIL proposal on this ground or urged that safeguards are necessary in order to afford it a realistic opportunity to compete for

[19b] As Comsat points out, procurement for INTELSAT is governed by its procurement regulations and proposals for spacecraft procurement are evaluated not only by the Manager but also by the Interim Committee and the Technical Subcommittee. Moreover, under the Definitive Arrangements Comsat will not have a veto power as a member of the Board of Governors. Further, it is subject to instructions from the United States Government insofar as its vote on the Interim Committee or the Board of Governors is concerned.

the procurement business of Comsat/AT&T or other domestic satellite applicants.

47. In light of all of the foregoing, we conclude that the Comsat/MCIL proposal as conditioned herein constitutes a significantly different situation from that before us at the time of the *Second Report* and that the public interest does not now require that Comsat elect between participating in the Comsat/MCIL applicant or serving AT&T. We turn next to the related question of whether Comsat should be permitted to serve AT&T on the basis contemplated by their lease agreement in the present circumstances.

b. The Comsat/AT&T lease agreement

48. The disallowance of the Comsat/AT&T lease agreement in the *Second Report* was premised largely on the following considerations (paragraph 13, 35 FCC 2d at 848–849): concern that Comsat would be unlikely to compete vigorously with AT&T in the provision of specialized domestic services because AT&T would be the principal source of the domestic revenues Comsat would seek to obtain; concern that the revenues from its contractual arrangement with AT&T would give Comsat an extraordinary advantage and headstart over domestic satellite entrants seeking to compete with Comsat and with AT&T's terrestrial services; and concern that Comsat's expertise and facilities would not be available to the public and carriers other than AT&T if Comsat elected to serve AT&T (paragraph 24, 35 FCC 2d at 852–853).

49. To a significant extent these concerns have been ameliorated by the nature of the Comsat/MCIL proposal and the conditions attached above for further consideration of that proposal and the Comsat/AT&T lease agreement. Thus, even assuming that should Comsat feel some constraint about competing vigorously with AT&T, it will not be in a position to preclude the directors selected by MCI and Lockheed and the Class B directors, who are not so constrained, from taking such action as they believe to be most conducive to successful operations by the Corporation. Indeed, their predominant role and influence may encourage Comsat to adopt a more aggressive competitive stance than it would assume if it were solely responsible for a domestic satellite system offering specialized services in competition to AT&T's terrestrial offerings. Moreover, while Comsat's participation in the Corporation and its overall financial position, including its revenues from the AT&T lease agreement, may make it easier for the Corporation to obtain equity or debt financing, it does not follow that the Comsat/MCIL system would be financed primarily or to any substantial degree out of revenues from AT&T. As MCIL points out, such revenues flow to Comsat and not to the Comsat/MCIL Corporation. Even if Comsat should use revenues derived from AT&T for a further capital investment in, or loan to, the Corporation, the conditions specified in paragraphs 41–42 above would preclude authorization of any financial plan of the Corporation that changes Comsat's presently proposed minority status, directly or indirectly, unless the Commission should find that the public interest will be served thereby in light of the circumstances then prevailing.

50. Acceptance of the Comsat/AT&T lease agreement for further consideration would deprive other carriers of an opportunity to lease transponders on the same system from Comsat under a tariff offering, as developed in the the *Second Report* (paragraphs 24–25; 35 FCC 2d at 852–853). However, the present Comsat/MCIL proposal and the proposal of American Satellite Corporation submitted on October 16, 1972, would, if authorized, increase the likelihood that such carriers will have other available options. Such carriers would also have the option of leasing transponder capacity in the Western Union System, if authorized, or that of any other carrier entrant offering this type of service. Comsat's expertise would be available to other carriers and to the public through the Comsat/MCIL system, if desired. In the present circumstances, we conclude that the public interest does not require that other carriers have access to the system used by AT&T under a tariff offering by Comsat. However, the special conditions in the *Second Report* and in paragraphs 64–76 below require AT&T to permit access to its facilities by other carriers, whether by lease or otherwise, for the purpose of service to Alaska, Hawaii and Puerto Rico.

51. There remains the question of whether one common carrier should be permitted to provide space segment capacity or other domestic satellite system services and/or facilities to another common carrier on a non-tariff basis. The *Second Report* did not raise any question about the Hughes/GTE applications on the ground that GTE was proposing to lease transponder capacity from a private entity on a non-tariff basis. However, aside from the policy conditions relating to Comsat and AT&T, the *Second Report* adopted a general requirement that other common carriers authorized domestic satellite system facilities shall offer all services, including services and facilities to other carriers, pursuant to tariff schedules setting forth all terms and conditions relating to each class of offering (*Second Report*, paragraph 31, 35 FCC 2d at 854–855). This requirement was deemed particularly essential for domestic satellite system common carrier licensees offering both "wholesale" and "retail" services (i.e., the provision of services and facilities to other carriers and the provision of end-to-end services to non-carrier customers) to insure that "other carriers leasing transponder or satellite system facilities are not burdened with any portion of the revenue requirements applicable to the supplying carrier's retail offerings" (*id.*).[20] It also constitutes an appropriate means of implementing the statutory requirements contained in Sections 202(a) and 203(c) of the Communications Act.

52. The Comsat/AT&T agreement presents a somewhat different situation in that the entire capacity of the proposed space segment facilities would be leased to AT&T. In view of our determination that the public interest does not require that Comsat offer service to other carriers on the same system in light of other available options,[21] the

[20] Although paragraph 31 of the *Second Report* is phrased in terms of "terrestrial carriers," our intent was not so narrow. That paragraph is hereby modified to delete the word "terrestrial" from the first and second sentences.

[21] While AT&T may be required to permit other carriers to have access to its leased transponder capacity as a result of our policy determinations with respect to service to Alaska, Hawaii and Puerto Rico, this requirement does not entail any arrangement between Comsat and such third parties or raise any question of possible cross-subsidy insofar as Comsat is concerned.

principal purpose of a tariff filing embodying the Comsat/AT&T contractual terms would be to afford AT&T the protections of Sections 203–205 of the Communications Act. Since GTE would be permitted to forego these protections in the event that the Hughes/GTE proposal is authorized, we will accord AT&T a similar option.[22] In other words, Comsat's provision of facilities and services to AT&T pursuant to their lease agreement will be treated as a non-common carrier activity not requiring a tariff filing.

53. Accordingly, in light of the changed circumstances now before us, the Comsat/AT&T applications based on their lease agreement will be accepted for further consideration under the policy conditions of the *Second Report* as modified herein.

c. The AT&T and Comsat petitions for reconsideration

54. Having decided to accept the Comsat/MCIL and Comsat/AT&T proposals for further consideration, for the reasons and under the conditions specified above, we find it unnecessary to reach the merits of those portions of the Comsat and AT&T petitions that seek reconsideration of the disallowal of the Comsat/AT&T lease agreement or of Comsat's request for reconsideration of the election requirement of the *Second Report*.[23] Since the Comsat/MCIL proposal is a substitute for Comsat's multi-purpose application, the latter application will be dismissed. In view of Comsat's minority role in the Comsat/MCIL Corporation, which substantially obviates the potential conflict of interest formerly posed by its multi-purpose application vis-a-vis Comsat's responsibilities to the INTELSAT system, we will not impose any general prohibition that would preclude the Comsat/MCIL Corporation from being authorized to own or operate domestic satellite facilities at any overseas point served by INTELSAT facilities. However, like other applicants, the Comsat/MCIL applicant will be subject to our determinations as to conditions under which domestic satellite facilities to serve Alaska, Hawaii and/or Puerto Rico-Virgin Islands will be authorized.

II. Service to Alaska, Hawaii and Puerto Rico-Virgin Islands

A. PLEADINGS OF THE PARTIES

1. The RCA petition for reconsideration

55. The *RCA applicants* have requested clarification or partial reconsideration of paragraphs 35–42 of the *Second Report* insofar as

[22] This does not mean, of course, that we are abdicating our responsibility to assure that customers of AT&T and/or GTE, and/or the RCA applicants, are not burdened with unreasonable costs. In the event that we should subsequently find in a rate making context that AT&T, or GTE, or the RCA applicants have not properly discharged their obligation to obtain and operate facilities in the most economical and efficient manner possible, any excess costs will not be included in any rate base, or charged to expense for rate purposes, but will be charged against surplus.

[23] Although Comsat requested oral argument in its petition for reconsideration, the pleadings of the parties afford an adequate basis for decision and that request is hereby denied.

they relate to service to Alaska. RCA Alascom supports the fundamental policy that, upon the advent of domestic satellite service, Alaska (along with Hawaii and Puerto Rico), should be included in the uniform mileage rate pattern that now obtains for interstate message telephone service (MTT) in the contiguous states "with all that such approach implies in terms of nationwide cost averaging and equalizations for interstate rate making purposes" (*Second Report*, paragraph 37). However, RCA Alascom urges that it should be permitted to interconnect with AT&T in the contiguous States, in accordance with existing interconnection policy and practice,[24] and it should provide the facilities between Alaska and the contiguous States, either through use the proposed system of the RCA applicants or through an appropriate ownership interest in the AT&T system. RCA Alascom further urges that it should be the only carrier authorized to provide record services to Alaska, and that rate levels for such services should be the "lowest reasonable," rather than made comparable to mainland charges, since they would not derive any subsidy from the interstate MTT "pool" of revenues.

56. According to RCA Alascom, the most important specific issue in its Petition relates to the points at which it will interconnect with AT&T's network for MTT service. RCA Alascom claims that its continued right to provide the interstate service with interconnection in the contiguous States is the foundation of its entire ability to service Alaska, as well as essential to fulfillment of its existing commitments to improve and expand both interstate and intrastate service for Alaska at greatly reduced rates. In order to be able to continue to provide present services and to make major investments for intrastate service, RCA Alascom asserts that it must be permitted to make additional necessary investments in interstate facilities and to derive a reasonable rate of return on interstate service.

57. In this connection, RCA Alascom alleges that it faces an unusual and difficult situation. It points out that a very high percentage of its existing facilities are leased rather than owned, and rental expense does not contribute to a carrier's return or profit from its participation in the interstate MTT pool of revenues.[25] Rather, return or profit is related to the carrier's investment in facilities used to participate in the rendition of interstate MTT service, which currently constitutes about 80% of its total operating revenues, and intrastate service is currently provided below cost. The State of Alaska has a land area

[24] RCA Alascom relies on: the Alaska Communications Disposal Act, 40 U.S.C. 771 *et seq.*; its legislative history (e.g., Senate Report No. 213 (pp. 8, 9–10) and House Report No. 662 (p. 4), 90th Cong., 1st Sess.; and *RCA Alaska Communications, Inc. et al.*, 26 FCC 2d 466, 473–474 (1970), RCA Alascom states that acting in reliance on present interconnection practices and its authorizations from the FCC and the Alaska Public Utilities Commission to effectuate the Alaska Communications Disposal Act, it has already cut rates by approximately one-third and has spent more than $45 million of the $56 million it is committed to invest by 1974. It stands ready to invest millions more in domestic satellite system facilities if authorized to do so.

[25] RCA Alascom does not have any substantial ownership interest in local exchange facilities in Alaska used to provide the "local loop" portion of interstate service or intrastate toll service.

comprising some 586,000 square miles, a total population of only 302,000 persons, and few population centers of any substantial size.[26] RCA Alascom states:

> With intrastate routes of 1,000 miles or more leading to very small population centers, with an obligation to provide telephone service to 142 Indian and Eskimo villages at costs which greatly exceed the revenues than can ever be expected from them and with all of its other obligations to serve Alaska under conditions which make that service a high risk undertaking, RCA Alascom is wholly dependent upon interstate business and revenues, which constitute its life blood.

58. While conceding that the existing interconnection practice for Alaska interstate service could be "maintained simply by affording RCA Alascom the right to an appropriate ownership interest in the AT&T system," RCA Alascom urges that use of the proposed system of the RCA applicants would be preferable. It claims that unit costs per transponder on the RCA system would be less than on AT&T's system, that coverage of Alaska by means of the elliptical main beam proposed by the RCA applicants is superior to the type of spot beam coverage proposed by AT&T, and that interconnection at multiple earth station points in the contiguous states, as proposed by RCA, would do more to de-emphasize distance as a cost factor than would AT&T's proposal for interconnection at a single gateway earth station on the West Coast.[27] RCA Alascom further notes that, unlike the RCA proposal, the AT&T system does not include any proposal for the use of 2 GHz frequencies for instructional television and intrastate radio service with small, low cost earth stations. Though claiming that there is no basis for an assumption that AT&T has greater ability to load a high capacity domestic satellite system, RCA Alascom states that it "is prepared to proceed on the basis that the costs of its satellite facilities and earth station facilities in the contiguous states utilized to derive message telephone circuits and thus included in the calculation of its share of revenues from the interstate telephone 'pool' would be based on a loading susbtantially equal to that" of AT&T, and that the "RCA applicants and their parent corporation, rather than the rate paying public, would assume the risk involved in being unable to 'achieve a substantial initial loading.'"

[26] We note that the 1970 Census reflects the following with respect to larger population centers and Census Divisions (equivalent in Alaska to a county):

City	Population	Census division	Population	Land area (square miles)
Anchorage	48,081	Anchorage	126,333	927
Fairbanks	14,771	Fairbanks	45,864	7,074
Juneau	6,050	Juneau	13,556	1,286
Bethel	2,416	Bethel	7,767	19,642

[27] The RCA applicants concede that, for the purpose of serving Alaska, access to satellite transponders through a single gateway earth station may result in a more efficient utilization of transponder capacity than would be achieved through access by multiple earth stations. However, in their reply comments the RCA applicants outline an approach for handling traffic, which they allege would minimize the difference between the two methods insofar as efficient use of transponder capacity is concerned. The RCA applicants state that they expect to file an amendment to their applications incorporating this approach.

2. Other parties

59. In its Petition for Reconsideration, *AT&T* comments on the question of service to Alaska, Hawaii and Puerto Rico, but does not expressly seek reconsideration of this portion of the *Second Report.* AT&T is of the view that these off-shore points should receive a high quality of service at rates supported by costs, with the ultimate objective that rate levels should be comparable to those provided on the mainland. However, AT&T questions whether this objective should be realized simultaneously with the advent of domestic satellites, and states that rates for services between these points and the mainland should not be made uniform with the mainland rate structure by imposing on mainland users the burden (which it estimates to approximate $100 million) of subsidizing the allegedly higher costs of such service.[28] Moreover, a diversity of facilities, both cable and satellite, is allegedly essential for the protection of services. Both cable and satellite costs are declining dramatically, and over a reasonable period of time would permit rate reductions to levels that approach the mainland rate structure.

60. AT&T's opposition to RCA's petition may be summarized as follows: The Commission has correctly concluded that Alaska should receive domestic satellite MTT service as an integral part of a larger domestic system. AT&T points out that it has previously offered the use of its system for this purpose. Making available to other carriers transponders in the AT&T system for the purpose of furnishing domestic satellite service to Alaska in conjunction with such carriers is the appropriate means of providing efficient and economical service to Alaska. Duplicate construction and operation by RCA of earth stations in the contiguous states, whether or not there is a duplicate space segment, would result in the expenditure of substantial sums—ultimately to be borne by the interstate rate payers. RCA's cost arguments are allegedly infirm, because they are based on the assumption of a 100% fill of the satellites and do not take account of the costs of earth stations, connecting terrestrial facilities, and additional multiplex costs attributable to RCA's multiple earth station access proposal. There are diseconomies and inefficiencies in the RCA proposal, such as having multiple carriers access a single transponder from separate earth stations—which may require a reduction in circuit capacity by one-half or more. According to AT&T, directing many small circuit groups to several different earth stations, rather than one large group to a single earth station, reduces significantly the traffic handling capability of each individual circuit.

61. The *State of Hawaii* generally supports paragraphs 35–40 of the *Second Report* and urges that it is important to the people of Hawaii that implementation of this goal proceed without further delay. The State "views with considerable alarm the position taken by AT&T" in its petition for reconsideration, and urges the Commis-

[28] AT&T is supported in this position by All America Cables and Radio, Inc. and ITT World Communications, Inc.

sion to reject that position as invalid and not in the public interest. It urges that AT&T has not defined the "inherent physical characteristics of service" which it alleges justify tariffs higher than mainland rates or the basis for its estimate for a $100 million burden on mainland rate payers if Hawaii, Alaska and Puerto Rico are integrated in the mainland rate pattern. The State of Hawaii also urges that GTE and other system applicants propose a type of geographic integration that is superior in certain respects to that proposed by AT&T, for, whereas they propose access to multiple earth stations in the contiguous states, AT&T is proposing to include Hawaii in point-to-point linkage with only one gateway earth station on the West Coast, "thus perpetuating the 'umbilical cord' service" that Hawaii now has.

62. The *State of Alaska* also approves of the Commission's decision to require integration of the cost of interstate Alaska service into the nationwide rate structure, and requests firm adherence to that policy. However, it is concerned that the *Second Report* may operate to the State's disadvantage in the area of improved intrastate service insofar as it eliminated Comsat as a contender for service to Alaska via domestic satellite. The State values the presence in Alaska of the most experienced and technically proficient company now operating in the field of satellite communications, and the potential of competition as a spur to innovation. It asserts that there is room for competition in the provision of some services to Alaska, and requests that all generally authorized carriers willing to assume the financial risks of entry be permitted to serve Alaska, including the Comsat/MCIL applicant.

63. *WUI* urges that RCA Alascom should not be granted a monopoly position for all services to Alaska. It requests that capital investment positions in the facilities of domestic satellite systems authorized to serve Alaska, Hawaii and Puerto Rico be made available to qualified entrants for the purpose of providing services other than MTT. In its Petition for Clarification of the *Second Report*, WUI also argues that Western Union is precluded by Section 222 of the Communications Act from operating between Hawaii or Puerto Rico and the mainland, and from owning or operating earth stations at these locations. WUI claims that services to such points are not "domestic" under law, and should be treated as "overseas" services in accordance with past practice.

B. DISCUSSION AND CONCLUSIONS

1. Service to Alaska, Hawaii and Puerto Rico

64. RCA's request for clarification or partial reconsideration of the *Second Report* is premised on valid concerns insofar as it may be construed as contemplating that MTT service between Alaska and the contiguous states would be furnished by means of satellite facilities owned or operated by AT&T. We are constrained to agree with RCA Alascom that in acquiring the Alaska Communications System (ACS) pursuant to the Alaska Communications Disposal Act, it succeeded to the right and responsibility of its predecessor to provide the facilities for the transmission of MTT traffic between Alaska and the con-

tiguous states. We acknowledged RCA Alascom's entitlement to perform this service in *RCA Alaska Communications, Inc. et al.*, 26 FCC 2d 466, 473–474 (1970). Thus, we recognized the importance and desirability of giving RCA Alascom "every legitimate opportunity to improve and expand interstate communications between Alaska and the lower forty-eight states." Hence, we stressed that we would not adhere to the practices applicable to overseas MTT service under which mainland carriers and their correspondents at the overseas locations interconnect at the satellite. As we indicated in that decision, RCA Alascom's offer, accepted by the Government, proposed to succeed to the interstate operations of ACS and anticipated that, regardless of the mode of communication it may be authorized to engage in, the interconnection practices previously followed by ACS would apply. ACS's practice was to interconnect with AT&T's domestic system at a gateway in or at the boundaries of the contiguous states and not at a midpoint between Alaska and the lower forty-eight states.

65. While the Commission qualified its action in the aforementioned proceedings as not being controlling of matters that may come before us in the future, we believe that the considerations which underpinned our ruling at that time are equally relevant to a resolution of the questions raised by RCA Alascom's instant petition. In other words, it is our view that in the interest of assuring that RCA Alascom shall have a *bona fide* opportunity to establish and maintain a viable financial condition required to discharge its obligations with respect to the development and improvement of services, RCA Alascom should have reasonable access to the revenues and earnings that may derive from interstate MTT operations. Accordingly, the policies formulated herein should accord to RCA Alascom, to the extent consistent with the public interest in efficient and economic service, appropriate responsibility for the operations involved in the rendition of interstate MTT service between Alaska and the lower forty-eight states.

66. It is our opinion that this objective can be realized in a manner consistent with the other objectives set forth in our *Second Report*, particularly that Alaska shall be integrated into the uniform mileage rate pattern that now obtains for the contiguous states. However, we are not in a position to conclude that these objectives will be met by authorizing, at this time, the provision of interstate MTT service to Alaska on independent satellite system facilities entirely owned by the RCA applicants. We recognize that the proposed system of the RCA applicants may offer some technical advantages (e.g., the use of an elliptical main beam covering the contiguous states and Alaska and the use of 2 GHz frequencies in addition to 4 and 6 GHz) which might benefit the State of Alaska with respect to such services as interstate television program transmission for reception at less expensive earth stations such as might be used by a community and for intrastate instructional television and radio service to "bush" communities.

67. There are, however, a number of uncertainties which we are unable to resolve on the basis of the record before us as to whether interstate MTT service to Alaska as proposed by the RCA applicants can be provided either as efficiently, or more efficiently and economi-

cally, than would be possible by reliance on the AT&T system proposal. For example, it is not clear that the proposed RCA system would be implemented as promptly as the AT&T system which is premised largely on developed technology whereas RCA's proposal is premised on largely undemonstrated technology. Nor is it clear that the RCA proposed system would be likely to achieve a level of traffic loading or fill sufficient to make a cost per unit of MTT service comparable to or more favorable than the unit costs derived from a domestic satellite system, such as proposed by AT&T, integrated into the nationwide MTT terrestrial network. In this connection, the record does not provide an adequate basis for evaluating the effects of RCA's proposed operation of multiple earth stations in the contiguous states on the efficient use of satellite transponder circuit capacity in the rendition of MTT service or the extent to which additional multiplex costs will be generated by RCA's multiple earth station access proposal.

68. The foregoing is not to be construed as foreclosing our consideration of a future application by the RCA applicants for authorization to transfer Alaskan service, including MTT, to the RCA system in the event that this system is implemented.[29] In this connection, we also take official notice that the RCA applicants are negotiating for the use of the Canadian Telsat satellite system as an interim measure for its provision of MTT services between Alaska and its own earth stations in the contiguous states. However, our authorization of either of these systems must be predicated upon a more convincing showing than has thus far been made that the cost of using such facilities for interstate MTT service to Alaska would be less than or approximately equivalent to the use of the domestic satellite system facilities of AT&T as discussed in paragraphs 65–66 above.

69. It is our view that until such showing is made by the RCA applicants, we shall require that AT&T extend to the RCA applicants appropriate access, by lease or otherwise, to the circuit capacity in the AT&T facilities involved in serving Alaska. We shall therefore condition any authorization of satellite and earth station facilities issued to AT&T accordingly. Any such arrangement will, of course, be subject to prior approval by this Commission.

70. By such arrangements, the RCA carriers, rather than AT&T, will be responsible for the costs associated with that portion of the satellite circuit facilities involved in providing MTT service between Alaska and those locations in the contiguous states where such facilities interconnect with the terrestrial MTT network of AT&T. In this context, we perceive no cost or other detriment to the interest of the general public in the availability of efficient and economic MTT service. Nor do we perceive any reason why such arrangements should

[29] Contrary to the construction of the RCA applicants, the *Second Report* does not require that MTT service to Alaska be provided exclusively on domestic satellite facilities or bar the use of alternative facilities for diversity purposes. We are concerned that the nationwide MTT and other interstate services not be burdened with costs that are greater than necessary in order to integrate Alaska into domestic rate patterns, and that full advantage be taken of any cost savings that can be derived from the use of domestic satellite facilities. However, the extent to which domestic satellites should be utilized is a matter the RCA applicants can address in their application to acquire circuit capacity in the satellite system facilities of AT&T and will be resolved in that context.

thwart our policy objective of promoting the integration of Alaska in the uniform mileage rate pattern as discussed in paragraphs 35–40 of the *Second Report.*

71. From a cost of service standpoint, there should be no significant difference to the total MTT service depending upon how cost responsibility for this increment of satellite circuit capacity is arranged. Although as a result of integrating Alaska into the interstate MTT uniform rate schedule, the costs related to such facilities may, to some extent, be subsidized by the interstate nationwide MTT pool of revenues, the total cost of nationwide MTT will not be significantly different whether AT&T or RCA Alascom is responsible for those costs. However, the arrangement is significant in terms of maintaining RCA Alascom's established role and responsibility as the supplier of interstate service between Alaska and the contiguous states.

72. We do not here resolve the question of whether service to Alaska and/or Hawaii (in the event of a determination that the AT&T rather than the GTE system should be utilized for MTT service to Hawaii) should be through one gateway earth station, as proposed by AT&T, or through multiple earth stations, as proposed by GTE and the RCA applicants and as urged by the State of Hawaii. Our policy objective is that service between Alaska, Hawaii and Puerto Rico and all mainland points shall be provided at rates and on terms comparable to those obtaining within the contiguous states and at the lowest possible cost. It is anticipated that AT&T and those carriers affected will work together in an effort to propose a mutually satisfactory solution, for the Commission's approval, which will best accomplish this objective considering all pertinent factors. In the event that they are unable to reach agreement, the applicants can address this matter in their application for authority to acquire circuit capacity in the AT&T system facilities. AT&T will also be afforded an opportunity to submit a showing in support of its position, as will the State of Hawaii and carriers now serving that State in the event of a determination that the GTE system should not be utilized for MTT service to Hawaii. Our decision as to what method would be less costly (all relevant factors considered) and should therefore be employed, will be made after consideration of such submissions.

73. However, we hereby reaffirm the policy determinations in paragraphs 35–38 and 40–41 of the *Second Report* (35 FCC 2d at 856–859) that rates for interstate services to Alaska, Hawaii and Puerto Rico shall not be higher because one or the other method is authorized, and that the advent of domestic satellite service will be accompanied by the integration of all interstate services between the mainland and Alaska, Hawaii and Puerto Rico into an enlarged domestic rate pattern. As specified in paragraphs 37–38, the timetable for accomplishing this and the question of whether any deviations should be permitted will be determined after consideration of the specific proposals for revised rates and supporting showings to be submitted by the affected carriers for Commission approval no later than six months after the issuance of authorizations for the system or systems to serve these

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points. We will at that time determine whether any further procedures are necessary and, if so, of what nature.

74. We also reaffirm our decision that carriers now providing services other than MTT to Hawaii, Alaska and Puerto Rico shall be afforded appropriate access to the AT&T system (and/or GTE system) and to the earth stations in Hawaii, Alaska and Puerto Rico used for the provision of interstate MTT service (paragraphs 38 and 40 of the *Second Report*). While this requirement pertains only to carriers now engaged in providing non-MTT services to these points, we do not foreclose consideration of an application by another carrier for authority to acquire a similar right of access to such facilities to provide non-MTT services upon a showing that the public interest would be served thereby (see paragraph 54 above). The question of whether such "appropriate access" should be afforded pursuant to a tariff offering by the supplying carrier or through a proportionate investment or rental interest in the facilities of the supplying carrier will be determined upon consideration of applications for authority to obtain such access and the responsive pleadings of the supplying carrier.

75. As indicated in paragraphs 38 and 40 of the *Second Report* such right of access to the satellite system facilities used for interstate MTT is designed to facilitate implementation of our goal that all interstate services to these three points shall be integrated into domestic rate patterns. It is also predicated on our belief that the public in Alaska, Hawaii and Puerto Rico should have an opportunity to take advantage of the potential cost savings in obtaining specialized services on the same satellite system facilities used for MTT without the necessity for duplicate earth station and space segment facilities. However, as stated in the *Second Report*, we do not preclude the authorization of independent domestic satellite system facilities to provide specialized interstate services to these points. In view of our policy determinations above with respect to the Comsat/MCIL proposal, and upon consideration of the arguments of the RCA applicants and the State of Alaska, we will consider on their merits applications from the Comsat/MCIL applicant or any other eligible applicant desiring to provide specialized interstate and/or intrastate services to these points, including Alaska, by means of independent satellite system facilities owned by such applicants.[30] We do not regard this policy as unduly prejudicial to RCA Alascom, since no duplicate facilities will be authorized for the provision of the interstate MTT service which concededly constitutes the bulk of the interstate business and revenues that are its "life blood." Furthermore, such applicants will be required to show with specificity how a grant of their application will serve the public interest and how they will provide tangible benefits in the form of new and better service, lower rates, etc. We will also consider the impact of a grant on the ability of RCA Alascom to discharge its responsibility to Alaska.

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[30] In the case of Alaska, we do not exclude the possibility that intrastate MTT service may be provided on domestic satellite facilities not used for interstate MTT, upon a showing that the public interest would be best served by such an authorization. As stated in the *Second Report*, AT&T will be required to afford access to its transponder capacity for the purpose of intra-Alaska service, if desired.

76. It is not practicable, however, to authorize all of the pending system applicants to serve Alaska, Hawaii and Puerto Rico or to adopt a licensing standard that makes the desire of a qualified applicant to serve one or more of these points the sole controlling consideration. There are only seven available orbital locations (at 3° separations) capable of viewing all 50 states at 4 and 6 GHz frequencies. While the system or systems authorized to provide MTT service to Alaska, Hawaii and Puerto Rico will not utilize all of these locations, we will not authorize use of the remaining locations for 4 and 6 GHz operations, in whole or in part, unless in addition to meeting the standard set forth above the applicant shows that it will provide an additional service which should be made available to all 50 states on the same system (e.g., interstate television program transmission) or that it will provide some service on terms and conditions of special benefit to the States of Alaska and/or Hawaii. Service at 4 and 6 GHz frequencies can be provided to the contiguous states and Puerto Rico by means of the 15 more easterly orbital locations that are available. The foregoing requirement will not apply to applicants proposing to use only frequencies other than 4 and 6 GHz, or to the use of an orbital location west of those capable of viewing all 50 states for operations at 4 and 6 GHz (and other frequencies allocated for communications satellite use) to provide service to Alaska and/or Hawaii and to such of the contiguous states as can be served by that orbital location.[31]

2. WUI petition for clarification[32]

77. Finally, in the case of Western Union which proposes to provide, among other services, network program transmission service, message, Mailgram and other services to Hawaii and Alaska,[33] there is an unresolved question as to whether and to what extent Western Union is barred by Section 222 of the Communications Act from furnishing any such services between the contiguous states and Hawaii. This question is now the subject of active consideration by the Commission pursuant to a petition for reconsideration filed by Western Union against an action taken by the Chief, Common Carrier Bureau which rejected an application of Western Union for authority to lease satellite channels from Comsat in the INTELSAT system in order to furnish Mailgram service between the United States Mainland and Hawaii. The Commission expects to resolve this question very shortly and will thereby determine the scope of permissible operations between these points for which Western Union may seek authorization.

78. Pending such determination, we will withhold processing of Western Union's application for authority to construct an earth station in Hawaii. We stress, however, that our assessment of an applica-

[31] See, *Second Report*, paragraph 42, 35 FCC 2d at 859; *Memorandum Opinion and Order*, paragraph 152, 34 FCC 2d at 72–73; *Public Notice* issued on November 9, 1972 (FCC 72–992).

[32] See paragraph 63 above.

[33] See, *Second Report*, paragraph 3 (35 FCC 2d at 845); *Memorandum Opinion and Order*, paragraph 10 (34 FCC 2d at 14); see also, Western Union's amended application filed on July 25, 1972. In this connection, we do not construe Section 222 of the Communications Act as precluding Western Union from owning or operating earth stations in the State of Hawaii for intrastate service.

tion by Western Union or any other applicant for an earth station in either Hawaii or Alaska must take account of the limited market in those states for non-MTT services and the effects thereof on the economic viability of satellite service, particularly in view of the relatively limited markets and the requirements we are imposing with respect to the integration of rates and charges for MTT services into the MTT rate schedule applicable within the contiguous states.

III. Interconnection

79. Our *Second Report* enunciated the policy objective of

> "* * * assuring that all carriers providing retail interstate satellite services (whether or not affiliated with Bell System companies) have access at nondiscriminatory terms and conditions to local loop and interexchange facilities as necessary for the purpose of originating and terminating such interstate services to their customers" (paragraph 34, 35 FCC 2d at 856).

In furtherance of this policy, we stated that we would require all terrestrial carriers seeking domestic satellite system authorizations to submit, for Commission approval, prior to action on their applications, a description of the kinds of interconnection arrangements they will make available to other satellite system and/or earth station licensees.

A. PLEADINGS OF THE PARTIES

80. In its petition for reconsideration of the *Second Report* AT&T urges that the requirement in paragraph 34 (see also, paragraph 2 (f) above) is unnecessary and burdensome, and would unduly delay authorizations for domestic satellite system facilities. It sets forth its belief that a preferable course would be that followed by the Commission in *Specialized Common Carrier Services* (29 FCC 2d at 940), primarily wherein we indicated our reliance on the commitments of existing carriers to negotiate interconnection arrangements with new carrier entrants on just, reasonable and non-discriminatory terms. AT&T further states that it sees no factual support in the record of this proceeding to justify the imposition of the condition adopted by the Commission in the *Second Report*.

81. Other parties commenting in response to this portion of AT&T's petition (e.g., *General Electric Co.* (GE) and *Fairchild Industries, Inc.* (Fairchild)) have taken positions contrary to that of AT&T. By letter dated November 22, 1972 *Western Union International* (WUI) also submitted an untimely pleading in support of the views of GE and Fairchild.[34]

B. DISCUSSION AND CONCLUSIONS

82. AT&T has failed to demonstrate how or why the requirement for nondiscriminatory access to local loops and interexchange facili-

[34] WUI's letter of November 22 is hereby accepted for our consideration.

ties controlled by AT&T and its operating subsidiaries is either unnecessary or burdensome. The entire thrust of our policy of encouraging multiple entities to provide service via domestic satellite facilities to meet current and emerging needs could be vitiated if such access were to be denied or unduly delayed. Furthermore, experience with respect to international communications, particularly insofar as the use of local loops and interexchange facilities are concerned for access between the offices of international carriers and earth stations which communicate with the INTELSAT satellites, refutes AT&T's contentions. During the many years when the required facilities were supplied to the international carriers by AT&T pursuant to Commission order for nondiscriminatory access, we have not been made aware of any difficulties or burdens whatsoever that these requirements imposed on AT&T.

83. Accordingly, we perceive no reason to reconsider, at this time, the policies and conditions set forth in the *Second Report* concerning interconnection. We simply reiterate that it is our intent and requirement that the terrestrial carriers who are applicants for satellite and/or earth station authorization comply fully with these policies and conditions. In this connection we stress that we will not accept as compliance a token statement of good intentions to negotiate appropriate terms and conditions. We have already indicated, with clarity, the type of objectives we believe can guide the carriers in formulating a specific framework of standards within which they will make their facilities available to other Commission licensees.

84. The availability of timely and effective interconnection arrangements may well, in many cases, be vital to the meaningful implementation of authorizations issued in the public interest in furtherance of the Commission's policies herein. We therefore intend to examine thoroughly the showings made by existing carriers in their applications for satellite facilities pursuant to the above cited provisions of our *Second Report*.[35] In the event that such showings fall short of satisfying us that interconnection will be offered in a timely manner by existing carriers to other licensees on reasonable and non-discriminatory terms and conditions, we will withhold the issuance of authorizations to the existing carriers and will take whatever affirmative actions as may be required for the prompt and effective implementation of our interconnection policies.

IV. Terms of Access by Public Broadcasting and Other Educational Interests

85. As indicated in paragraph 3 above, our *Second Report* stated the Commission's willingness to entertain specific proposals by carriers or users for the prescription of preferential rate classifications, but declined to initiate any requirement as to common carriers or to enunciate any general statement of policy at this time (paragraph 43, 35 FCC 2d at 859).

[35] See also, *Public Notice* issued on November 9, 1972 (FCC 72-992).

A. PLEADINGS OF THE PARTIES

86. In its petition for partial reconsideration of the *Second Report*, the *NAEB* urges us to set forth more specific policy objectives now and to require, rather than invite, rate proposals from all carrier applicants for domestic satellite system facilities. The position of NAEB is supported by the *Corporation for Public Broadcasting* (CPB) and the *Public Broadcasting Service* (PBS). In their comments filed on October 30, 1972, CPB and PBS stated that they would have no objection to Commission approval of the proposed Comsat/MCIL joint venture if that Corporation should adhere to the commitment in the pending MCIL application as to service to educational interests. However, in the event that Comsat/MCIL Corporation has different views, CPB and PBS request that the Corporation be required to state their position and that CPB and PBS be afforded an opportunity to submit specific comments bearing on this matter.

B. DISCUSSION AND CONCLUSIONS

87. We have carefully considered the requests of NAEB, CPB, and PBS that we specify policy objectives, rather than simply invite rate proposals from all carrier applicants. However, we are of the opinion that there are ample safeguards and statutory guidelines and policies to promote, in a timely fashion, the interests of educational broadcasters and other educational users in preferential rates. We will, of course, welcome a showing by all applicants as to the terms and conditions upon which they will make their services available to public broadcasting and educational interests. We recognize, nevertheless, that it may well be premature to expect applicants, several years in advance of their operational date, to have sufficient cost and other information available to set forth their rate proposals with specificity. It was based on the same considerations that the Commission indicated in the *Second Report* that it is not in a position at this time to enunciate any general statement of policy beyond that indicated in the analysis and conclusions of the staff recommendation (*Memorandum Opinion and Order*, paragraphs 153–162, 34 FCC 2d at 73–76) and our statement in paragraph 43 of the *Second Report* (35 FCC 2d at 859).

88. Concerning the request that the Comsat/MCIL joint venture be required to adhere to the commitments made by MCIL in its pending application, we do not feel that we would be justified in holding the new applicant to any greater obligation or standard than we have laid down for all other carrier applicants to follow in the matter of free or reduced rate service for educational interests.

V. The National Environmental Policy Act of 1969

89. The Commission did not treat the question of the applicability of the National Environmental Policy Act of 1969 (NEPA)[36] to the

[36] 42 U.S.C. section 4331 *et seq.*

policy objectives adopted in our *Second Report*, although the Network Project was granted leave to participate in the oral argument held in this proceeding on May 1–2, 1972 and raised this question in its oral presentation. Since the issuance of the *Second Report* we have instituted a rule making proceeding (Docket No. 19555) looking toward the adoption of rules in this area which are designed to govern our action on applications for authorization for construction and operation of the various types of radio, cable and wire facilities, including communications satellites and earth stations that are subject to our jurisdiction. Although that proceeding is still pending before us, we are applying the proposed rules to all such applications.

A. PLEADINGS OF THE PARTIES

90. In its Petition for Reconsideration of the *Second Report*, the *Network Project* asserts principally that the *Second Report* is in contravention of the NEPA in the following respects:

(a) In the *Second Report* the Commission did not employ a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts, as required by Section 4332 (2)(A) of the NEPA, which is applicable to this proceeding since the earth-transmitting and microwave relay stations to be employed in a domestic satellite system would emit microwave radiation which may have an adverse impact on man's environment;

(b) The Commission did not identify and develop methods and procedures, in consultation with the Council on Environmental Quality, in order to insure that presently unquantified environmental amenities and values, regarding the imposition of such microwave radiation, will be given appropriate consideration in the Commission's resolution of this proceeding along with the economic and technical considerations, as required by Section 4332 (B) of the NEPA;

(c) The Commission did not include a detailed statement discussing such matters as the environmental impact on, and possible alternatives to, the establishment of a domestic satellite system, as required by Section 4332 (2)(C) of the NEPA, which is applicable to this proceeding since, in light of such microwave radiation, a policy looking toward the potential establishment of multiple domestic satellite systems is a major Federal action significantly affecting the quality of the human environment;

(d) The Commission did not study, develop, or describe appropriate alternatives to the recommended courses of action made in the 1970 Report and Order in Docket No. 16495, its staff recommendation, or in the *Second Report* as required by Section 4332 (D) of the NEPA, which is applicable to this proceeding because the establishment of a policy looking toward the authorization of domestic satellite systems involves unresolved conflicts concerning alternative uses of available resources; and

(e) The Commission did not initiate and utilize ecological information in the planning and development of domestic satellite systems, as required by Section 4332 (2) (G) of the NEPA, which is applicable to this proceeding since the establishment of a policy looking toward authorization of such systems constitutes a resource-oriented project.

91. In support of the foregoing assertions, the Network Project relies on scientific literature expressing concern regarding the potential physiological and behavorial dangers posed to man by low intensity, nonionizing microwave radiation.[37] As legal authority for its position the Network Project cites: *Calvert Cliffs' Coordinating Committee* v. *A.E.C.*, 449 F. 2d 1109, 1123–4 (C.A.D.C. 1971); *WMOZ, Inc.* v. *F.C.C.*, 344 F. 2d 197 (C.A.D.C. 1965); *Banzhaf* v. *F.C.C.*, 405 F. 2d 1082, 1096–7 (C.A.D.C. 1968), *cert. den. sub nom. Tobacco Institute* v. *F.C.C.*, 396 U.S. 842 (1969); *National Helium Corp.* v. *Morton*, 455 F. 2d 650, 654–5 (C.A. 10 1971); *Ely* v. *Velde*, 451 F. 2d 1130, 1138 (C.A. 4 (1971)). For the Network Project's arguments in support in its position, see pages 14–27 of its petition for reconsideration of the *Second Report*, the affidavit attached to the petition, and its subsequently filed *errata*. By way of relief, the Network Project requests the Commission to rescind the *Second Report* and to remand this proceeding to the staff, so that our staff can prepare a detailed draft environmental impact statement which could be subject to ongoing review and reconsideration through the agency review process.

92. In opposition to the Network Project's petition, *MCIL* asserts that it has raised a highly novel question with respect to the Commission's compliance with NEPA. MCIL argues that the Network Project's concern is premised largely on a study presented to OTP by ERMAC (see footnote 37 above), which recommended a $63 million research program with respect to the biological effects of nonionizing electromagnetic radiation; and that the Network Project is requesting us "to undertake the type of thorough study recommended in the ERMAC Report." MCIL points to statements made by a member of our staff at the oral argument on May 2, 1972 (see Transcript, pages 393–395) and asserts that the pleading of the Network Project (as well as its supporting affidavit) does not allege any actual harm,

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[37] The Network Project cites, *inter alia:* Michaelson, "Human Exposure to Nonionizing Radian Energy—Potential Hazards and Safety Standards," 60 Proceedings of the IEEE, pages 389, 390 (April, 1972); Bowers and Frey, "Technology Assessment and Microwave Diodes," Scientific American, pages 13, 21 (February, 1972); a standard adopted by the Department of Labor pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. 657 (36 F.R. 10466, 10522–3 (1971)); A. H. Frey, "Human Auditory System Response to Modulated Electromagnetic Energy," 17 J. Appl. Physiol. pages 689–692 (1962); R. L. Carpenter, "Studies on the Effects of 2450 Mc Radiation on the Eye of the Rabbit." *Proceedings of the Third Annual Tri-Service Conference Biological Hazards of Microwave Radiating Equipments* (University of California, Berkeley), pages 279–290 (1959); A. F. Frey, "Biological Function as Influenced by Low-Power Modulated RF Energy," IEEE Transactions on Microwave Theory and Techniques, Vol. MTT–19 (February 1971), pages 153–164; and (concerning direct and indirect effects on the central nervous system of man) Yu. A. Kholodov, "The Effect of an Electromagnetic Field on the Central Nervous System," 4 *Priroda* (USSR), pages 104–105, Library of Congress, ATD P 65–68, FTD–TT 62–1107; Yu. A. Kholodov, "The Effect of Electromagnetic and Magnetic Fields on the Central Nervous System," NASA Technical Translation, TTF–465, Washington, D.C. 1967; and a *Program for Control of Electromagnetic Pollution of the Environment: The Assessment of Biological Hazards of Nonionizing Electromagnetic Radiation*, pages 2, 5, and 9 submitted to the Office of Telecommunications Policy (OTP) by the Electromagnetic Radiation Management Advisory Council (ERMAC).

but rather states that there is no assurance that human beings would be reasonably safe if authorizations implementing the policy objectives of the *Second Report* were to be issued. MCIL also takes issue with the scientific literature cited by the Network Project (see footnote 37 above), and urges that any problem relating to terrestrial radio radiation is not limited to the authorization of domestic satellite facilities but rather concerns all radio authorizations granted by this Commission—particularly those for television broadcast stations. MCIL asserts that it would be irresponsible and contrary to the public interest to halt all radio licensing actions, "pending long research programs to fill in remote lacunae in our present state of scientific knowledge." It also argues that the legal authorities cited by the Network Project deal with "very real environmental problems, not mere conjections about unknown laws of nature." [38]

93. In reply to MCIL's opposition, the Network Project takes issue with the arguments briefly summarized above, and concludes its reply statement as follows (pages 7–8) :

"In conclusion, the number of research conclusions criticized by the single author cited by MCI-Lockheed underscores the substantiality of scientific opinion supportive of the position that low level radiation bears the potential for significantly affecting the quality of the human environment. To the extent that definitive evidence as to the consequences of such radiation is lacking, the presence of 'known' consequences or of 'answers' to questions surrounding the effects of such radiation is not a prerequisite to the Commission's obligation to prepare an environmental impact statement, and the substance of the impact statement, required by Section 102(2)(C) of NEPA, 42 U.S.C. sec. 4332(2)(C), can and should be tailored accordingly. Aside from the preparation of an environmental impact statement, the consideration, utilization, and study—on the record—of environmental factors and information remain as required elements of this proceeding, pursuant to Section 102 (A), (B), (D), and (G) of NEPA * * *."

B. DISCUSSION AND CONCLUSIONS

94. Upon consideration of the pleadings of the parties and the views of our staff, we have determined to require all applicants for earth stations and satellite facilities to make a satisfactory showing that their operations will comply with governmentally prescribed standards for the protection of employees and the general public against excess levels of non-ionizing radiation. In this regard we have reference to the standards promulgated by the Department of Labor pursuant to the Occupational Safety and Health Act of 1970, giving maximum levels of continuous exposure of employees. We shall require each applicant for earth station and satellite facilities to make a full showing of the measures he has taken to comply with these standards. The Occupational Safety and Health Act of 1970, governing levels of continuous exposure for employees covered by the Act, specifies a maximum of ten milliwatts per square centimeter of area (10 mW/cm^2) averaged over any 6 minute period. These levels derive from Standard C95.1 of the American National Standards Institute (ANSI). Essentially these same levels have been adopted by the three military services.

[38] See pages 9–12 of MCIL's opposition.

95. We will expect applicants to conduct studies to predict radiation levels in and around earth stations and their associated terrestrial facilities. The results of such studies shall be submitted to the FCC as part of the appropriate application. Licensees will also be required to conduct surveys at intervals to be specified in our authorizations. Such surveys will be conducted in and around earth stations and their associated terrestrial facilities to determine levels of radiation. All licensees will also be required to identify areas having levels above 10 mW/cm^2. Such areas shall be prominently posted with appropriate warnings. As any additional evidence becomes available, which would raise further questions with respect to adverse effects of radiation and indicate a reasonable probability of damage to the quality of the environment, we will promptly take such action as is necessary to mitigate and obviate the dangers of which we are made aware. In this connection, applicants for satellite facilities will be subject to any other applicable requirements of the proposed environmental protection rules now being considered in Docket 19555, including any revisions of such rules as finally promulgated therein by the Commission. It is, of course, also our intention to comply fully with the requirements of NEPA in the handling of applications for authority to use the radio spectrum and to coordinate our efforts with those other branches of the federal government which are concerned with environmental matters.

VI. Miscellaneous

96. With respect to various other requests made in pleadings of parties to Docket No. 16495, our views are as follows: First, in light of our resolution of the policy issues in the *Second Report*, as modified herein, we are of the opinion that any remaining questions raised by the petition of the Network Project (p. 30), that have not previously been treated in this proceeding, should be appropriately considered in connection with the processing of the applications. Second, the pleading filed by WUI on September 22, 1972, and supported by Datran, which suggested a possible solution to certain of the policy questions determined in this proceeding, is hereby dismissed as moot. And, finally, the Request for Licensing Policy filed by the RCA applicants on September 26, 1972, will be treated as a petition for rule making and placed on public notice in accordance with the Commission's usual procedures.

97. Finally, we have taken note that various United States entities have been exploring the possible use of the Canadian Telsat System until such time as domestically owned space segment facilities are available and operational. In fact, two applicants for domestic common carrier satellite authorizations have recently entered into agreements with Telsat of Canada for the lease of transponder capacity in the Telsat system, subject to obtaining this Commission's authorization. Implementation of these arrangements would, of course, require appropriate authorizations by this Commission since such arrangements involve the construction and operation of earth stations in the United States. We are not now pre-

pared to state definitively what our policies will be with respect to the use of the Telsat system for the purposes contemplated by either carriers or noncarriers. The use of the Telsat system for purely domestic communications purposes is not barred or inhibited by any international agreement to which the United States is signatory. However, each specific proposal involving the use of Telsat of Canada will be examined for its justification in terms of all applicable statutory requirements and the policies set forth herein at such time as we are presented with implementing applications for authorization.

VII. Order

98. In light of all of the foregoing, IT IS HEREBY ORDERED, pursuant to Sections 1, 2, 3, 4(i) and (j), 201, 202, 203, 212, 214, 218, 219, 220, 301, 303, 307–309, 310(b), 319, 396, 403, and 605 of the Communications Act of 1934 and Sections 102, 201(c), and 303–304 of the Communications Satellite Act of 1962, as amended, That:

A. The requests made by the various parties to this proceeding in pleadings filed since the *Second Report* ARE GRANTED to the extent reflected herein and ARE OTHERWISE DENIED.

B. This proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

CONCURRING STATEMENT BY CHAIRMAN BURCH

Candidly, carving up the marketplace and unfurling protective umbrellas are abhorrent to me in principle—and the limitations we have imposed on AT&T's initial use of satellite technology clearly cross the line in both respects. But we are not here dealing just with principle: we are in the grip of reality, and we must deal with it as best we can.

There is no ignoring the fact that AT&T's domination of the domestic communications market, and its attendant potential for cross-subsidization of competitive leased-line services from its monopoly telephone services, pose serious obstacles to competitive entry by firms having no established and/or protected revenue base. Such firms have to take their chances (as the Commission made clear in the Specialized Common Carrier decision) and must demonstrate in the marketplace that competition will redound to the public benefit—but they must also have a chance to get started. That, essentially, is the rationale for the inhibitions we have imposed on AT&T's initial use of satellite technology.

But my reading of today's Commission action is that these inhibitions are truly interim in nature, pending resolution of such matters as AT&T's ownership of Comsat stock and the conclusion of a finite

period during which competitive suppliers may emerge and achieve substantial fill of satellite facilities. Thus we have set a termination date-certain—three years from the commencement of AT&T's domestic satellite operations—absent affirmative action by the Commission to extend the limitations. And such action will depend on a detailed and compelling showing (repeat, *compelling*) by other interested parties that such extension is required in the public interest.

Clearly, this Commission—as of December 22, 1972—can neither prejudge nor prejudice the action that some future Commission may find necessary to protect the public interest. But I for one want the record to show that we expect the burden of proof regarding any extension of these limitations to rest squarely on other parties. It will be up to them to demonstrate that the marketplace in the full range of communications services should *not* be free and open to all comers. For that, in the final analysis, is what this arduous and complex proceeding has been all about.

Chairman Burch is joined in this CONCURRING STATEMENT by Commissioners Reid and Wiley.

F.C.C. 72-1197

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In Re Applications of FORT COLLINS BROADCASTING CO., INC. For Renewal of Broadcast License for Stations KIIX-AM-FM, Fort Collins, Colorado	File Nos. BR-3761 and BRH-1734

MEMORANDUM OPINION AND ORDER

(Adopted December 21, 1972; Released December 29, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT. COMMISSIONER HOOKS DISSENTING.

1. The Commission has before it for consideration (i) the above-captioned license renewal applications, filed by Fort Collins Broadcasting Co., Inc. (Fort Collins); (ii) petitions to deny the above-captioned license renewal applications, filed March 16, 1971, by the Colorado Committee on the Mass Media and the Spanish-Surnamed, Inc. (Committee); and (iii) Fort Collins' opposition to the petitions to deny.

2. To place this proceeding in proper perspective, it is noted, by way of background, that the Commission, on September 11, 1970, consented to the voluntary assignment of the licenses for KIIX and KIIX-FM from Poudre Valley Broadcasting Co., Inc. to Fort Collins Broadcasting Co., Inc. The assignment of license applications were consummated on September 21, 1970. Then, on January 5, 1971, the new licensee timely filed applications for renewal of the broadcast licenses for KIIX and KIIX-FM. These licenses, along with all other broadcast licenses in the State of Colorado, were scheduled to expire April 1, 1971.

3. Pursuant to Section 1.580(i) of the Commission's rules (47 C.F.R. § 1.580(i)), a petition to deny a Colorado broadcast renewal application was required to be filed on or before March 1, 1971. Unable to meet this deadline, the Colorado Committee filed a petition requesting a 60-day extension of time to file petitions to deny 46 Colorado broadcast renewal applications, including those for KIIX and KIIX-FM. The Commission, by Memorandum Opinion and Order adopted March 4, 1971, 28 FCC 2d 375, denied the requested 60-day extension of time on the grounds that the Committee had shown no basis therefor. Nevertheless, since the Commission noted that it was setting forth a "new mood", the Committee was granted an extension of time until March 12, 1971, within which to file its petitions to deny.

4. Unable to meet the March 12th deadline, the Committee, by letters dated March 12 and 14, 1971, requested a further extension of time until March 19, 1971, or, alternatively, March 15, 1971. The Commission, by letter dated March 17, 1971, FCC 71–289, denied the Committee's alternative request. In the meantime, however, on March 16, 1971, the Committee filed petitions to deny the license renewal applications for Stations KIIX and KIIX–FM. In short, the Committee maintains that the Commission should designate for evidentiary hearing KIIX and KIIX–FM's license renewal applications on the grounds that Fort Collins has: (a) failed to maintain employment practices which avoid discrimination against employees and applicants on the grounds of national origin; (b) failed to ascertain the needs of the public, particularly of the Spanish-surnamed community; (c) violated the Commission's rules regarding the filing of time-broker agreements; (d) violated the Commission's rules regarding making available for public inspection the stations' license files; and, (e) demonstrated lack of good character by the use of threats and harassment tactics in an attempt to discourage citizen action in broadcasting.

5. Each of the Committee's allegations, and Fort Collins' responses thereto, will be discussed below. At the outset, however, it is noted that the Committee's petitions to deny were filed on March 16, 1971, four days after the extension of time granted by the Commission. The petitions, therefore, do not meet the requirements with respect to timeliness and are, thus, procedurally defective. Accordingly, the Committee's petitions to deny will be dismissed as formal petitions to deny filed pursuant to Section 309(d)(1) of the Communications Act of 1934, as amended (47 U.S.C. § 309(d)(1)), as implemented by Section 1.580(i) of the Commission's rules. However, due to the nature of the matters raised by the Committee, we have elected to treat the petitions as informal objections filed pursuant to Section 1.587 of the Commission's rules (47 C.F.R. § 1.587).

6. Sections 73.125 and 73.303 of the Commission's rules (47 C.F.R. § 73.125, 73.303) provide that licensees of standard and FM broadcast stations shall give all persons equal employment opportunities, and shall not discriminate against any person because of race, color, national origin, religion, or sex.

7. The Committee maintains that Fort Collins is guilty of discriminatory employment practices in violation of Section 73.125 and 73.303. In support of its position, the Committee submits that Larry Mendoza is not an actual employee of KIIX–AM–FM but an independent contractor operating under a brokered-time agreement with the stations (see paragraphs 13–15, below). The Committee also submits that two other employees claimed to be American Indians by Fort Collins are, ". . . apparently, only nominally Indians with few if any ties, ethnic or cultural, with the Indian community." The Committee also questions the employment status of Miss Valdez, stating that it was unable to elicit from the station manager any details concerning her position with the station.

8. Fort Collins became the licensee of KIIX–AM–FM on September 21, 1970, approximately three months before filing the stations'

pending license renewal applications, and approximately five months before the Committee filed the instant petitions to deny. According to Fort Collins, KIIX–AM–FM employ a total of nine (9) persons, two of whom are Spanish-surnamed Americans (namely, Larry Mendoza and Miss Valdez) and two of whom are American Indians (namely, Francis Lilly and J. J. McPartrin). Fort Collins submits that Mr. Mendoza, a blind Mexican American, does a one-hour, five day per week, Spanish language program consisting of music, news, commercials and public service material of interest to the Mexican American community. Fort Collins also states that Miss Valdez assists Mr. Mendoza by converting his material to braille; and, further, since Mr. Mendoza's program is conducted in Spanish, monitors his program to assure proper licensee control. With regard to Miss Lilly and Mr. McPartrin, Fort Collins submits that they are American Indians and that both have been employed since the licensee purchased KIIX–AM–FM.

9. In view of the above, we do not believe that the Committee's allegations regarding Fort Collins' employment practices warrant further exploration in an evidentiary hearing. To warrant an evidentiary hearing on an employment discrimination issue, a petitioner must go beyond allegations such as those submitted herein and at least establish with some degree of specificity that the licensee has followed an exclusionary pattern or otherwise discriminated against applicants or employees because of race, color, religion, national origin, or sex. It is clear here that the Committee has fallen short of establishing with any degree of specificity any such pattern or instances of discrimination subsequent to the licensee's acquisition of KIIX–AM–FM.

10. The Committee also maintains that Fort Collins' community survey is inadequate. The Committee notes, in support of its position, that the Spanish speaking community represents eight per cent of Fort Collins' 43,000 total population. Recognizing that Fort Collins' survey of community leaders gives pro-rata attention to the Spanish speaking community, the Committee nonetheless states that such attention may be insufficient to meet the special obligations a licensee has to a minority group. The Committee also takes issue with Fort Collins' general public survey asserting that the telephone method utilized was inadequate in that the licensee failed to give pro-rata attention to the Spanish speaking community.

11. Fort Collins, in opposition, notes that its community survey was approved by the Commission when it consented to the voluntary assignment of KIIX–AM–FM's licenses. Briefly, in its portion of the aforementioned assignment application, Fort Collins submitted a list of 15 community leaders interview regarding community problems. Fort Collins also conducted a survey of 100 members of the general public. As a result of these surveys, Fort Collins enumerated the various community problems ascertained and proposed programming responsive to those problems. In this latter respect, it is noted that, after the assignment of licenses was granted to Fort Collins, the licensee expanded the stations' one-hour Spanish language program from one day per week to five days per week, and that it proposed to devote other weekly air time to present programming relevant to minority interests.

12. The Committee did not file any objections concerning Fort Collins' community survey at the time the assignment applications for KHIX–AM–FM were pending before the Commission, and we are of the opinion that petitioner has not shown any unusual, compelling, or extraordinary circumstances which justify a re-evaluation of the licensee's ascertainment efforts. In short, in view of the size of Fort Collins' staff, we are satisfied that the licensee has ascertained the problems of its proposed service area from a representative cross-section of persons in that area—including the Spanish-surnamed community, has effectively evaluated the problems ascertained, and has proposed programming to meet those problems. We conclude, therefore, that there is no necessity for a hearing on the basis of the Committee's allegations regarding Fort Collins' ascertainment efforts.

TIME BROKERAGE

13. Section 1.613(c) of the Commission's rules (47 C.F.R. § 1.613 (c)), requires a licensee to file with the Commission any "[c]ontracts relating to the sale of broadcast time to 'time brokers' for resale." One who buys time from the broadcaster and resales the time to advertisers or others is a time broker. *United Broadcasting Co. of New York*, FCC 65–52, 4 RR 2d 167, 173 (1965).

14. The Committee maintains that Fort Collins has entered into a time brokerage agreement with Larry Mendoza, that this agreement is oral in violation of Section 1.613(c), and that the agreement constitutes a discriminatory pricing practice since advertisers on Mr. Mendoza's program are charged higher rates than other advertisers are charged. The crux of a time brokerage agreement is the sale of time by the station to the time broker. The Committee has not presented any facts which would indicate that Fort Collins has sold time to Mr. Mendoza or that Mr. Mendoza has bought time from Fort Collins. *Radio Station KAYE*, 2 FCC 2d 440 (1966).[1] On the other hand, Fort Collins' submission shows that Mr. Mendoza presents a one-hour Spanish language show five days per week and that he sells advertising time on this show, as well as other programs, and receives a commission for the success of his efforts. The mere selling of advertising time does not constitute a time brokerage arrangement.

15. Another characteristic of a time brokerage arrangement is that the buyer of the time bears the risk for its resale; that is, he is directly liable to the licensee for payment of the time. *WGOK, Inc.*, 2 FCC 2d 245 (1965). The Committee presents no facts suggesting that Mr. Mendoza would be liable to Fort Collins for any time he was unable to sell. We note, in this connection, that the advertising rates, billing, collection and all other business associated with Mr. Mendoza's program are handled by Fort Collins. We also note that the Committee has failed to submit any evidence that advertisers on Mr. Mendoza's program are charged higher rates than other advertisers are charged, whereas Fort Collins' submission shows that advertisers on Mr. Men-

[1] Assuming, *arguendo*, that Mr. Mendoza has a time brokerage arrangement with Fort Collins and that the licensee has failed to file a contract in accordance with Section 1.613(c), such an isolated violation of the Commission's rules would be insufficient to designate for hearing KHIX–AM–FM's license renewal applications. Instead, other administrative sanctions, such as a forfeiture, would be more appropriate.

doza's program are charged three to five dollars per announcement, depending on the number of commercials purchased, just as in other time segments. Finally, contrary to the Committee's allegation, Mr. Mendoza's program is logged in accordance with the Commission's rules.

PUBLIC FILE—HARASSMENT

16. In addition to the foregoing, the Committee contends that a grant of the above-captioned renewal applications would not be in the public interest because Fort Collins does not possess the requisite good character qualifications. In support of this contention, the Committee asserts that Fort Collins failed to make available for inspection the stations' files when so requested on March 9, 1971, but, instead, raised questions about the credentials of the Committee's representatives. While the Committee notes that the public file was made available on March 10, 1971, it nevertheless maintains that Fort Collins' violation of the Commission's applicable regulation "not only demonstrates the stations' failure to operate in the public interest, but also is an indictment of the licensee's character and commitment to the policies of the federal law." The Committee also asserts that Fort Collins used threats and harassment tactics in an attempt to dissuade the Committee from filing its petition. In this regard, the Committee notes that Fort Collins threatened to file suit against the Committee for defamation if it did not withdraw its petitions and, moreover, broadcast an editorial wherein the Committee was "blasted."

17. In opposition, Fort Collins acknowledges that it threatened to file suit against the Committee for defamation but has delayed such action on the advice of counsel pending Commission action on the Committee's petitions. Fort Collins also notes that it broadcast an editorial regarding the Committee's petitions. In this respect, however, Fort Collins states that the Committee was offered time for reply and that the Committee refused this offer. Concerning the Committee's other allegation, the licensee asserts that "[a]ny statement that the licensee was reluctant to show public information is absolutely false." Rather, the licensee states that the Committee was "shown every single document they asked for, and without hesitation."

18. We have carefully reviewed the allegations set forth in paragraphs 16 and 17 and, based upon the facts presented, do not believe that a hearing is warranted. We have examined the editorial broadcast by Fort Collins on March 6, 1971, and we find that it in no way attempts to discourage the Committee from expressing its grievances to the Commission. The editorial merely gives Fort Collins' opinions as to the merits of the petitions to deny and questions the responsibility of its authors. Moreover, we note that the Committee was offered reply time by Fort Collins, which was declined. With regard to Fort Collins' alleged harassment tactics, we must take into account two considerations: (1) licensees, as do all individuals, have the right to pursue any legal remedies they may have at their disposal; and (a) the Act is especially designed so that the Commission's processes are available to members of the public and, therefore, caution should be

109-022—73——4

exercised by licensees so as not to hinder public participation. Obviously, Fort Collins, acting like any other potential litigant, believed in good faith that it could advise the Committee that it might file suit. Further, Fort Collins' actions were undoubtedly influenced to a degree by the fact that it had just recently purchased KIIX–AM–FM and felt that the Committee's charges were unjustified. Under these circumstances, and particularly since this is a matter of first impression, we do not believe that these facts reflect adversely on the licensee's character qualifications. But we do stress that broadcast licensees should exercise great care and caution in any statements or threats to petitioners that if they file or maintain their filing, they may be subject to suit. For, such notification may discourage access to this Commission, and we certainly do not wish to make the matter turn on the agency's judgment of the reasonableness or good faith of the threat of suit. In our view, the most appropriate course is therefore generally to refrain from any threat of suit by a broadcast licensee in these circumstances at least until the matter is concluded by the Commission.

19. Finally, with respect to the question of compliance with Section 1.526 of the Commission's rules, this Commission is constantly confronted with conflicting claims regarding the availability for public inspection of a station's renewal application and related documents. Here the Committee claims that its representatives were denied access to Fort Collins' public files on March 9, 1971. Conversely, Fort Collins claims that this allegation is absolutely false. One fact is clear: the Committee admittedly was able to inspect Fort Collins' public file on March 10, 1971. Therefore, we consider this matter closed. However, we wish to emphasize that licensees should not deny the examination of their renewal applications by public groups. Rather, such files should be made available upon request and every reasonable effort should be made to facilitate examination of the application by citizens: this includes, of course, provision of a desk or other writing surface unless that is impossible. These requirements must be observed whether or not the person examining the application is sympathetic to the station.

Conclusions

20. Section 309(d) of the Communications Act provides for the grant of a license renewal application where the Commission finds, after full consideration all pleadings, that there are no substantial and material questions of fact and that a grant of the application would be consistent with the public interest. Section 309(d) also provides that where a petition to deny is filed it must contain specific allegations of fact sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest. Where the Commission finds that such a showing has not been made, it may deny the petition. Accordingly, based upon our review of Fort Collins' renewal applications and all the pleadings filed in this proceeding, we find that The Colorado Committee on the Mass Media and Spanish-Surnamed, Inc. has failed to raise a substantial and material question of fact which establishes a *prima facie* case for denial of KIIX–AM–FM's licenses. We also find that a grant of Fort Collins Broadcasting

Co., Inc.'s license renewal applications for KIIX and KIIX–FM would serve the public interest, convenience and necessity.

21. In reaching our conclusions, we are not unaware of the concern being expressed by The Colorado Committee and other minority groups about the responsiveness of the broadcast media to their problems. Hence, we note with concern the fact that petitioners herein have filed petitions to deny the license renewal applications of several stations located in Colorado. We also note with concern that similar petitions have been filed against many stations in other states. The Commission, of course, cannot waive or ignore the pleading standards set forth in Section 309(d) to accommodate petitioners. Clearly, if members of the public choose to wait until the end of a license term and then petition to deny renewal of license, they must meet the strict requirements of Section 309(d). This does not mean however that members of the public are left without the means to improve local broadcast service. We have found that cooperation at the local level is the best and most effective method of resolving local problems and improving local service. Accordingly, we wish to reaffirm our prior expression of policy approving community-broadcaster discussions throughout the license term. Obviously, while under an obligation to ascertain and program for community problems, no broadcaster can be aware of everyone's needs all the time. Therefore, interested citizens who feel a station's performance is inadequate should so advise the broadcaster to provide him the opportunity to consider their ideas and suggestions. Such discussions will, of course, be more effective if conducted throughout the license term and not only at renewal time.

22. Accordingly, IT IS ORDERED, That the petitions to deny filed by the Colorado Committee on the Mass Media and Spanish-Surnamed, Inc., ARE DISMISSED, and when considered as informal objections ARE DENIED.

23. IT IS FURTHER ORDERED, That the above-captioned license renewal applications for Stations KIIX and KIIX–FM, filed by Fort Collins Broadcasting Co., Inc., ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

Fort Collins Broadcasting Company's application to renew its license for stations KIIX (AM and FM), Fort Collins, Colorado, has been challenged by the Colorado Committee on the Mass Media and Spanish Surnamed, Inc. (Committee). Among other things, the Committee's petition to deny charges the licensee with harassment. Petitioners contend that the licensee did not make its station file available when requested. Further, petitioners allege that the licensee, when confronted by the Committee's inquiries and petition to deny, broadcast an editorial against the Committee and threatened to sue the Committee for defamation if it did not withdraw its petition.

Fort Collins admits that it threatened the Committee with a defamation action, admits that it broadcast an editorial against the Committee

(to which it invited the Committee to respond), but denies that it was reluctant to show the Committee its public file.

The Federal Communications Commission, announcing out of one side of its collective mouth that broadcaster harassment of citizens groups will not be tolerated, nevertheless grants the licensee's renewal application. At first blush, those two acts might appear inconsistent. Upon more studied analysis, they appear down right irreconcilable.

The majority explains that the licensee, in threatening petitioners with a defamation suit, was merely pursuing the legal remedies at its disposal. Yet, the majority does not designate this matter for a hearing in order to determine the licensee's motives. And, indeed, it seems fair to suggest that those motives were questionable, since the licensee's counsel apparently advised against bringing the defamation action at least until after the FCC's renewal of the station's license.

The majority, however, is obviously not concerned with such harassment. Nor is it troubled by the Committee's claim that the licensee initially refused to make its station file public. The majority notes that petitioners were eventually shown the file, and that ends the matter.

The difficulty with this myopic approach is that when one considers the cumulative effect of the licensee's conduct (*i.e.*, threat of a law suit, refusal to make the station's public file available, and an editorial launched against petitioners), one cannot help but conclude that the licensee was attempting, through coercive means, to head off the petitioner's challenge. Such harassment tends to defeat the entire purpose of this Commission's rules regarding citizens' complaints and petitions to deny.

The majority, of course, does not like those rules anyhow, and does not appreciate the various concerned citizens groups that seek to have their communities' broadcasters better serve the public interest.

I dissent.

F.C.C. 72-1200

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
NEW SUBPART D, PART O OF THE FCC RULES, PUBLIC AVAILABILITY OF CLASSIFIED MATERIAL

ORDER

(Adopted December 22, 1972; Released December 27, 1972)

BY THE COMMISSION: COMMISSIONER H. REX LEE ABSENT.

A new Subpart D is added to Part O of the FCC Rules to codify that portion of security regulations pertaining to the public availability of classified material.

This action is taken to comply with Executive Order 11652 (37 F.R. 5209, March 10, 1972) and the National Security Council Directive of May 17, 1972 (37 F.R. 10053, May 19, 1972). The prior notice and effective date provisions of the Administrative Procedure Act (5 U.S.C. 553) do not apply inasmuch as the new rules will benefit the public by clarifying procedures concerning access to classified documents, compliance with the prior notice and deferred effective date provisions of the APA (5 U.S.C. 553) would be contrary to the public interest.

The Interagency Classification Review Committee has approved the new regulations from which this material was extracted. Accordingly, IT IS ORDERED, That the rules in the attached appendix are adopted effective January 5, 1973.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

Part O of Chapter I of Title 47 of the Code of Federal Regulations is amended to add a new Subpart D to read as follows:

SUBPART D—PUBLIC AVAILABILITY OF CLASSIFIED MATERIAL

GENERAL

Sec.
0.501 Purpose.
0.502 Classification Review Committee.
0.503 Administrative enforcement.
0.504 Limitation of authority for original classification.

DOWNGRADING AND DECLASSIFICATION

Sec.
0.521 Introduction.
0.522 General Declassification Schedule.
0.523 Exemption from General Declassification Schedule.
0.524 Applicability of the General Declassification Schedule to previously classified material.
0.525 Declassification of classified information or material after thirty years.
0.526 Systematic reviews.
0.527 Classification Review Committee.
0.528 Review of classified material over 30 years old.
0.529 Availability of declassified material.
0.530 Classification review requests.

ACCESS TO CLASSIFIED MATERIALS

0.541 Access by historical researchers.
0.542 Access by former Presidential appointees.

AUTHORITY: The provisions of this Subpart D (§§ 0.501—0.542) issued under Executive Order 11652 (37 F.R. 5209, March 10, 1972) and National Security Council Directive of May 17, 1952 (37 F.R. 10053, May 19, 1972).

SUBPART D—PUBLIC AVAILABILITY OF CLASSIFIED MATERIAL

GENERAL

§ 0.501 Purpose.

Pursuant to Executive Order 11652, the Commission prescribes the following regulations to ensure that classified information and material is protected, but only to the extent and for such period as is necessary. The regulations identify the information to be protected, prescribe classification, downgrading, declassification and safeguarding procedures to be followed, and establish a monitoring system to ensure the regulations' effectiveness.

§ 0.502 Classification Review Committee.

The Executive Director has been assigned the responsibility for ensuring effective compliance with and implementation of these regulations. He will chair the Commission's Classification Review Committee which shall have authority to act on all suggestions and complaints with respect to the Commission's administration of these regulations. The General Counsel, or a senior member of his staff designated by him, and the Security Officer will serve as members of the Committee. All suggestions and complaints including those regarding overclassification, failure to classify, or delay in declassifying not otherwise resolved, shall be referred to the Committee for resolution. In addition, the Committee shall review all appeals of requests for records under Section 522 of Title 5 U.S.C. (Freedom of Information Act) when the proposed denial is based on their continued classification under Executive Order 11652.

§ 0.503 Administrative enforcement.

The Classification Review Committee shall have responsibility for recommending to the Chairman appropriate administrative action to correct abuse or violation of any provision of these regulations, including notifications by warning letters, formal reprimand, and to the extent permitted by law, suspension without pay and removal. The Committee will maintain a record of the action taken.

§ 0.504 Limitation of authority for original classification.

The Commission's authority for original classification of national security information or material under these regulations is limited to "Secret" and "Confidential." It shall be exercised only by (a) the Chief Engineer, (b) the Chief of the Field Engineering Bureau (FEB), and (c) the Executive Director. The Chief Engineer and the Chief, FEB shall exercise authority for original

classification of information or material originated by their respective offices. The Executive Director shall exercise authority for the original classification of all other information or material originated by the FCC.

DOWNGRADING AND DECLASSIFICATION

§ 0.521 Introduction.

Classified information and material, unless declassified earlier by the original classifying authority, shall be declassified and downgraded in accordance with the provisions of §§ 0.522—0.530.

§ 0.522 General Declassification Schedule.

Classified information and material shall be declassified as soon as there are no longer any grounds for continued classification within the classification category definitions. At the time of origination the classifier shall, whenever possible, clearly mark on the information or material a specific date or event upon which downgrading or declassification shall occur. Such dates or events shall be as early as is permissible without causing damage to the national security. Whenever earlier dates or events cannot be determined, the General Declassification Schedule set forth below shall apply. If the information or material is exempted under § 0.523, the classifier shall clearly mark the material to show that it is exempt and indicate the applicable exemption category. Unless impossible, the exempted information or material shall be assigned and clearly marked by the classifier with a specific date or event upon which declassification shall occur. Downgrading and declassification dates or events established in accordance with the foregoing, whether scheduled or non-scheduled, shall to the extent possible be carried forward and applied whenever the classified information or material is incorporated in other documents or material. When classified information or material from more than one source is incorporated into a new document or other material, the document or other material shall be classified, downgraded or declassified in the manner prescribed herein as applicable to the information requiring the greatest protection.

(a) "Top Secret." Information or material originally classified "Top Secret" shall become automatically downgraded to "Secret" at the end of the second full calendar year following the year in which it was originated, downgraded to "Confidential" at the end of the fourth full calendar year following the year in which it was originated and declassified at the end of the tenth full calendar year following the year in which it was originated.

(b) "Secret." Information and material originally classified "Secret" shall become automatically downgraded to "Confidential" at the end of the second full calendar year following the year in which it was originated, and declassified at the end of the eighth full calendar year following the year in which it was originated.

(c) "Confidential." Information and material originally classified "Confidential" shall become automatically declassified at the end of the sixth full calendar year following the year in which it was originated.

§ 0.523 Exemption from General Declassification Schedule.

Certain classified information or material may warrant some degree of protection for a period exceeding that provided in the General Declassification Schedule. The Commission is not authorized to grant such exemption for any information it originated; however, it may receive exempted information from officials of Departments or Agencies having such authority. In each case such official shall specify in writing on the material the exemption category being claimed and, unless impossible, a date or event for automatic declassification. The use of the exemption authority shall be kept to the absolute minimum consistent with national security requirements and shall be restricted to the following categories:

(a) Classified information or material furnished by foreign governments or international organizations and held by the United States on the understanding that it be kept in confidence.

(b) Classified information or material specifically covered by statute, or pertaining to cryptography, or disclosing intelligence sources or methods.

(c) Classified information or material disclosing a system, plan, installation, project or specific foreign relations matter the continuing protection of which is essential to the national security.

(d) Classified information or material the disclosure of which would place a person in immediate jeopardy.

§ 0.524 Applicability of the General Declassification Schedule to previously classified material.

Information or material classified before June 1, 1972, and which is assigned to Group 4 under Executive Order No. 10501, as amended by Executive Order 10964, shall be subject to the General Declassification Schedule. All other information or material classified before June 1, 1972, whether or not assigned to Groups 1, 2, or 3 of Executive Order No. 10501, as amended, shall be excluded from the General Declassification Schedule. However, at any time after the expiration of ten years from the date of origin it shall be subject to a mandatory classification review and disposition under the same conditions and criteria that apply to classified information and material created after the effective date of these regulations, as set forth in Section 0.522. The Office of the Executive Director is hereby designated as the office to which members of the public or Departments may direct requests for mandatory review for declassification under this provision. This office shall, in turn, assign the request to the appropriate office for action. In each instance, receipt of the request will be acknowledged in writing immediately by the office which has been assigned action. Thereafter, that office shall make a determination within 30 days of receipt, or shall explain why further time is necessary. If at the end of 60 days from receipt of the request for review no determination has been made, the requester may apply to the Commission Committee, established by Section 0.502 of these regulations, for a determination. Should the office assigned action on a request for review determine that under the criteria set forth in Section 0.523 continued classification is required, the requester shall be promptly notified, and, whenever possible, provided with a brief statement as to the reasons for denying the request. The requester may appeal any such determination to the Commission Committee and the notice of determination shall advise him of his right. If the requester requires the rendering of services for which fair and equitable fees should be charged pursuant to Title 5 of the Independent Offices Appropriations Act 1952, 65 Stat. 290, 31 U.S.C. 483a, the requester shall be so notified.

§ 0.525 Declassification of classified information or material after thirty years.

All classified information or material which is thirty years old or more, whether originating before or after the effective date of this order, shall be declassified under the following conditions:

(a) All information and material classified after June 1, 1972 shall, whether or not declassification has been requested, become automatically declassified at the end of thirty full calendar years after the date of its original classification except for such specifically identified information or material which the head of the originating Department personally determines in writing at that time to require continued protection because such continued protection is essential to the national security or disclosure would place a person in immediate jeopardy. In such case, the head of the Department shall also specify the period of continued classification.

(b) All information and material classified before June 1, 1972, and more than thirty years old is systematically reviewed for declassification by the Archivist of the United States by the end of the thirtieth full calendar year following the year in which it was originated. In his review, the Archivist separates and keeps protected only such information or material as is specifically identified by the head of the Department in accordance with paragraph (a). In such case, the head of the Department shall also specify the period of continued classification.

§ 0.526 Systematic reviews.

All information and material classified after the effective date of these regulations and determined in accordance with Chapter 21, 44 U.S.C. (82 Stat. 1287) to be of sufficient historical or other value to warrant preservation shall be systematically reviewed on a timely basis by each Bureau or Office for the purpose of making such information and material publicly available in accordance with the determination regarding declassification made by the classifier under this section. During each calendar year each Bureau or Office shall segregate to the maximum extent possible all such information and material warranting preservation and becoming declassified at or prior to the end of such year. Promptly after the end of such year the Commission, or the Archives of the United States, if transferred thereto, shall make the declassified information and material available to the public to the extent permitted by law.

§ 0.527 Classification Review Committee.

The Committee shall establish procedures to review and act within 30 days upon all applications and appeals regarding requests for declassification. The Commission acting through the Committee shall be authorized to overrule previous determinations in whole or in part when, in its judgment, continued protection is no longer required. If the Committee determines that continued classification is required under the criteria of Section 0.522, it shall promptly so notify the requester and advise him that he may file an application for review with the Commission and thereafter may appeal to the Interagency Classification Review Committee.

§ 0.528 Review of classified material over 30 years old.

A request by a member of the public or by a Department under Section 0.525 to review for declassification documents more than 30 years old shall be referred directly to the Archivist of the United States. If the information or material requested has not been transferred to the General Services Administration for accession into the Archives, the Archivist, together with the Commission, review the requested documents for declassification. Classification shall be continued in either case only where the Chairman makes at that time the personal determination required by Section 0.525. The Archivist notifies the requester of such determination and of his right to appeal the denial to the Interagency Classification Review Committee.

§ 0.529 Availability of declassified material.

Upon a determination under Sections 0.524, 0.525, 0.526, or 0.528, that the requested material no longer warrants classification, it shall be declassified and made promptly available to the requester, if not otherwise exempt from disclosure under Section 552(b) of Title 5 U.S.C. (Freedom of Information Act) or other provision of law.

§ 0.530 Classification review requests.

A request for classification review must describe the document with sufficient particularity to enable the Commission to identify it and obtain it with a reasonable amount of effort. Whenever a request is deficient in its description of the record sought, the requester should be asked to provide additional identifying information whenever possible. Before denying a request on the ground that it is unduly burdensome, the requester should be asked to limit his request to records that are reasonably obtainable. If nonetheless the requester does not describe the records sought with sufficient particularity, or the record requested cannot be obtained with a reasonable amount of effort, the requester shall be notified of the reasons why no action will be taken and of his right to appeal such decision.

ACCESS TO CLASSIFIED MATERIALS

§ 0.541 Access by historical researchers.

Persons outside the Executive Branch engaged in historical research projects may be authorized access to classified information or material provided that the Commission determines that:

(a) The project and access sought conform to the requirements of Section 12 of Executive Order 11652.

(b) The information or material requested is reasonably accessible and can be located and compiled with a reasonable amount of effort.

(c) The historical researcher agrees to safeguard the information or material in a manner consistent with the Order and Directives thereunder.

(d) The historical researcher agrees to authorize a review of his notes and manuscript for the sole purpose of determining that no classified information or material is contained therein. An authorization for access shall be valid for the period required but no longer than two years from the date of issuance unless renewed under Commission regulations.

§ 0.542 Access by former Presidential appointees.

Persons who previously occupied policy making positions to which they were appointed by the President, may be authorized access to classified information or material which they originated, reviewed, signed or received while in public office. Upon the request of any such former official, such information and material as he may identify shall be reviewed for declassification.

F.C.C. 72-1171

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of RADIOHIO, INC. For Renewal of Licenses for Stations WBNS and WBNS-FM, Columbus, Ohio and WBNS-TV, INC. For Renewal of License for Station WBNS-TV, Columbus, Ohio	File Nos. BR-290 and BRH-852 File No. BRCT-57

MEMORANDUM OPINION AND ORDER

(Adopted December 20, 1972; Released January 3, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT. COMMISSIONER HOOKS DISSENTING.

1. The Commission has before it for consideration: (i) the above-captioned license renewal applications for Stations WBNS, WBNS-FM and WBNS-TV, all of which are located in Columbus, Ohio; (ii) a petition to deny the above-captioned license renewal applications; and (iii) various other related pleadings.

BACKGROUND OF THE PROCEEDING

2. The proceeding has become somewhat complex in view of the number of pleadings which have been filed. Therefore, we will set forth a brief resume of the history of the proceeding to facilitate a better understanding of the matters which have been raised by the parties and our ultimate disposition of those matters.

3. Initially, we note that RadiOhio, Inc., licensee of WBNS-AM-FM, and WBNS-TV, Inc., licensee of WBNS-TV, are under common ownership, RadiOhio, Inc. and WBNS-TV, Inc., will, therefore, hereinafter be referred to as "licensees".

4. The licenses for WBNS-AM and FM were last renewed on September 8, 1967, and the license for WBNS-TV was last renewed on September 11, 1967, all for terms ending October 1, 1970. Pursuant to Section 1.539 of the Commission's rules, 47 C.F.R. 1.539, licensees seeking renewal of their station authorizations must file application therefor on FCC Form 303 at least 90 days before the expiration date of the station license. Accordingly, the licensees herein timely filed applications for renewal of licenses for Stations WBNS-AM-FM-TV on July 1, 1970.

5. Pursuant to Section 309(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. 309(d)(1), any party in interest may file a petition to deny any application filed with the Commission, including a license renewal application. Pursuant to Section 1.580(i) of the Commission's rules, 47 C.F.R. 1.580(i), a petition to deny a timely filed license renewal application must be filed on or before the first day of the last full calendar month preceding the expiration date of the station's license being challenged. Accordingly, on August 31, 1970, the Columbus Broadcasting Coalition, hereinafter referred to as "petitioner", timely filed a petition to deny the license renewal applications for Stations WBNS–AM–FM–TV. In short, petitioner seeks designation of these license renewal applications for evidentiary hearing to explore the licensees' ascertainment efforts, programming performance, employment practices, and alleged monopolistic control over the media.

6. Section 1.45 of the Commission's rules, 47 C.F.R. 1.45, provides that, where a petition to deny is filed, an opposition thereto may be filed within ten (10) days after the petition is filed. Section 1.45 of the rules also provides that the party filing the petition to deny may file a reply to any opposition to its petition to deny within five (5) days after the time for filing the opposition has expired. Section 1.45 provides further that the reply pleading shall be limited to matters raised in the opposition. Section 1.45(c) of the Commission's rules provides that additional pleadings may be filed only if specifically requested or authorized by the Commission.

7. On September 10, 1970, licensees herein filed an opposition to the petition to deny directed against the license renewal applications for WBNS–AM–FM–TV. On September 15, 1970, the petitioners filed a motion seeking a six week extension of time in which to file its reply to licensees' opposition pleading. Although the licensees filed, on September 16, 1970, a motion opposing petitioner's request for an extension of time, the Commission granted petitioner an extension of time to and including October 12, 1970. Thereafter, two joint motions were filed by the parties requesting further extensions of time, ultimately to October 30, 1970, on the grounds that they were trying to settle their differences at the local level.

8. However, when negotiations failed, petitioner, on October 30, 1970, filed another request for an additional extension of time to complete and file its reply pleading. This request was opposed by licensees by pleading filed November 6, 1970. Prior to ruling on petitioner's request and licensees' opposition thereto, petitioner, on November 16, 1970, filed its reply to the licensees' opposition pleading. Concurrent with its reply pleading, petitioner filed a motion seeking its acceptance, notwithstanding failure to include the required number of copies. Also, on the same day—i.e., November 16, 1970—petitioner filed a "Supplement to Reply to Opposition to Deny Renewal of Broadcast Licenses", a "Corrected Copy" of the reply, and an "Errata" thereto. Subsequently, on December 9, 1970, licensees filed a pleading entitled "Response to Reply to Opposition to Petition to

Deny Renewal of Broadcast Licenses". This pleading then prompted petitioner to file, on June 11, 1971, a pleading entitled "Reply to Response to Reply to Opposition to Petition to Deny Renewal of Broadcast Licenses".

PROCEDURAL MATTERS

9. As previously noted, Section 309(d)(1) of the Communications Act provides that any party in interest may file a petition to deny any application filed with the Commission. Petitioner states that the Columbus Broadcasting Coalition is a group of incorporated and unincorporated organizations composed of persons residing in and around Columbus, Ohio. Accordingly, we find that petitioner has standing in this proceeding as a party in interest within the purview of Section 309(d)(1) of the Communications Act. *Office of Communications of the United Church of Christ* v. *Federal Communications Commission*, 359 F. 2d 994 (1966).

10. Also, as previously noted, Section 1.45 of the Commission's rules provides for the filing of a petition to deny, an opposition thereto and a reply, the purpose of which is to respond to points made in the opposition pleading. Licensees' pleading of December 9, 1970, charges that petitioner raises "new matter" in its reply pleading and, therefore, that this new matter should be stricken or, alternatively, that licensees are entitled as a matter of right to file a response to said new matter. In its pleading of June 11, 1971, petitioner avers that no new matter was raised in its reply pleading, that licensees do not have the right to file a response to the reply pleading, that licensees' response of December 9, 1970 contains new matter, and that the response should be dismissed and the new matter stricken.

11. We have reviewed petitioner's reply pleading to determine whether it does, in fact, raise new matter in contravention of Section 1.45 of the rules. In sum, the reply pleading is to a large extent merely an amplification of the points made in the petition to deny. The reply pleading does, however, contain additional facts in support of several of the allegations contained in the petition to deny and, thus, raises "new matter".

12. We do not, of course, condone the use of any pleading for other than its designated purpose; nor do we condone the use of additional pleadings which thwart the orderly administration of the Commission's processes. To do so would serve notice that our rules could be effectively ignored. However, under the circumstances presented in this case, we do not believe that consideration of all the pleadings filed will be prejudicial to the parties, particularly since they have responded to each others charges and counter-charges. We will, therefore, consider all the pleadings submitted by the parties. In so doing, however, we wish to reemphasize that the Commission does not condone violation of its procedural rules and that, in the absence of extenuating or unusual circumstances, we will not consider such pleadings in the future.

5. Pursuant to Section 309(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. 309(d)(1), any party in interest may file a petition to deny any application filed with the Commission, including a license renewal application. Pursuant to Section 1.580(i) of the Commission's rules, 47 C.F.R. 1.580(i), a petition to deny a timely filed license renewal application must be filed on or before the first day of the last full calendar month preceding the expiration date of the station's license being challenged. Accordingly, on August 31, 1970, the Columbus Broadcasting Coalition, hereinafter referred to as "petitioner", timely filed a petition to deny the license renewal applications for Stations WBNS–AM–FM–TV. In short, petitioner seeks designation of these license renewal applications for evidentiary hearing to explore the licensees' ascertainment efforts, programming performance, employment practices, and alleged monopolistic control over the media.

6. Section 1.45 of the Commission's rules, 47 C.F.R. 1.45, provides that, where a petition to deny is filed, an opposition thereto may be filed within ten (10) days after the petition is filed. Section 1.45 of the rules also provides that the party filing the petition to deny may file a reply to any opposition to its petition to deny within five (5) days after the time for filing the opposition has expired. Section 1.45 provides further that the reply pleading shall be limited to matters raised in the opposition. Section 1.45(c) of the Commission's rules provides that additional pleadings may be filed only if specifically requested or authorized by the Commission.

7. On September 10, 1970, licensees herein filed an opposition to the petition to deny directed against the license renewal applications for WBNS–AM–FM–TV. On September 15, 1970, the petitioners filed a motion seeking a six week extension of time in which to file its reply to licensees' opposition pleading. Although the licensees filed, on September 16, 1970, a motion opposing petitioner's request for an extension of time, the Commission granted petitioner an extension of time to and including October 12, 1970. Thereafter, two joint motions were filed by the parties requesting further extensions of time, ultimately to October 30, 1970, on the grounds that they were trying to settle their differences at the local level.

8. However, when negotiations failed, petitioner, on October 30, 1970, filed another request for an additional extension of time to complete and file its reply pleading. This request was opposed by licensees by pleading filed November 6, 1970. Prior to ruling on petitioner's request and licensees' opposition thereto, petitioner, on November 16, 1970, filed its reply to the licensees' opposition pleading. Concurrent with its reply pleading, petitioner filed a motion seeking its acceptance, notwithstanding failure to include the required number of copies. Also, on the same day—i.e., November 16, 1970—petitioner filed a "Supplement to Reply to Opposition to Deny Renewal of Broadcast Licenses", a "Corrected Copy" of the reply, and an "Errata" thereto. Subsequently, on December 9, 1970, licensees filed a pleading entitled "Response to Reply to Opposition to Petition to

Deny Renewal of Broadcast Licenses". This pleading then prompted petitioner to file, on June 11, 1971, a pleading entitled "Reply to Response to Reply to Opposition to Petition to Deny Renewal of Broadcast Licenses".

PROCEDURAL MATTERS

9. As previously noted, Section 309(d)(1) of the Communications Act provides that any party in interest may file a petition to deny any application filed with the Commission. Petitioner states that the Columbus Broadcasting Coalition is a group of incorporated and unincorporated organizations composed of persons residing in and around Columbus, Ohio. Accordingly, we find that petitioner has standing in this proceeding as a party in interest within the purview of Section 309(d)(1) of the Communications Act. *Office of Communications of the United Church of Christ* v. *Federal Communications Commission*, 359 F. 2d 994 (1966).

10. Also, as previously noted, Section 1.45 of the Commission's rules provides for the filing of a petition to deny, an opposition thereto and a reply, the purpose of which is to respond to points made in the opposition pleading. Licensees' pleading of December 9, 1970, charges that petitioner raises "new matter" in its reply pleading and, therefore, that this new matter should be stricken or, alternatively, that licensees are entitled as a matter of right to file a response to said new matter. In its pleading of June 11, 1971, petitioner avers that no new matter was raised in its reply pleading, that licensees do not have the right to file a response to the reply pleading, that licensees' response of December 9, 1970 contains new matter, and that the response should be dismissed and the new matter stricken.

11. We have reviewed petitioner's reply pleading to determine whether it does, in fact, raise new matter in contravention of Section 1.45 of the rules. In sum, the reply pleading is to a large extent merely an amplification of the points made in the petition to deny. The reply pleading does, however, contain additional facts in support of several of the allegations contained in the petition to deny and, thus, raises "new matter".

12. We do not, of course, condone the use of any pleading for other than its designated purpose; nor do we condone the use of additional pleadings which thwart the orderly administration of the Commission's processes. To do so would serve notice that our rules could be effectively ignored. However, under the circumstances presented in this case, we do not believe that consideration of all the pleadings filed will be prejudicial to the parties, particularly since they have responded to each others charges and counter-charges. We will, therefore, consider all the pleadings submitted by the parties. In so doing, however, we wish to reemphasize that the Commission does not condone violation of its procedural rules and that, in the absence of extenuating or unusual circumstances, we will not consider such pleadings in the future.

THE PLEADINGS

13. We now turn our attention to the pleadings. In so doing, we note that the material submitted in this proceeding is lengthy and somewhat repetitious. Therefore, we have summarized the petitioner's objections and licensees' responses thereto to the greatest extent possible. We believe, however, that the following accurately describes the nature of the pleadings filed herein.

ASCERTAINMENT

14. Question 1, Part I of Sections IV–A (radio) and IV–B (television) of the Commission's various broadcast application forms—including FCC Form 303, the license renewal application—is designed to elicit information concerning the methods used by broadcast applicants to ascertain community problems and the programming they propose to broadcast to deal with those problems. On December 19, 1969, the Commission issued a *Notice of Inquiry and Proposed Primer on Ascertainment of Community Problems by Broadcast Applicants*, 20 FCC 2d 880, in an effort to clarify the information required of broadcast applicants in responding to Question 1, Part I of Sections IV–A and IV–B. Thereafter, on February 23, 1971, the Commission issued its final version of the *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650.

15. Pursuant to the guidelines set forth in the *Primer*, an applicant is required to conduct a community survey, within six months of the date of the filing of the application, of a cross-section of community leaders and a random sample of members of the general public. The community leader survey must be conducted by management level personnel of the applicant. The general public survey may be conducted by other employees of the applicant or the applicant may contract with an independent organization to conduct the survey. The purpose of these surveys is to ascertain community problems, not programming preferences. Having completed the surveys, the applicant is then required to submit a list of the problems ascertained, evaluate those problems to determine which of them merit treatment on its station, and, finally, propose programming designed to deal with those problems.

16. In their initial submission under Question 1, Part I of Sections IV–A and IV–B of the above-captioned applications, licensees provide a general description of the Columbus, Ohio, area and outline the various methods employed by the WBNS stations to ascertain community problems. By way of brief summary, and as detailed in Exhibit 3 of the above-captioned applications, licensees note that they ascertain community problems through (i) involvement of their staff's in community activities, (ii) the reading and study of local newspapers, (iii) on-the-air announcements requesting listener and viewer comments and suggestions, and (iv) their news and public affairs departments. Licensees also note that their representatives participate in the Columbus Town Meeting Association, which is composed of and provides the

leadership of the Columbus area an opportunity to suggest program matter to relate to community problems.

17. The licensees note further that during the period extending from June 1969 to December 1969, a community leadership survey was conducted for the WBNS stations by Dr. James L. Golden and Dr. Richard M. Mall of Ohio State University. Sixty-three community leaders were interviewed during this survey. These leaders represent fields such as business and industry, service organizations, education, religion, crime prevention and protection, politics, medicine, law, journalism, civil rights, youth and women. The interviewees are identified by name, position, and organization (Exhibit 3–E, pp. 8–11) and thirty-six separate problems were ascertained and identified during this survey (Exhibit 3–E, pp. 5–6). In this respect, licensees provide an evaluation of these problems. This evaluation provides, in part, as follows:

First, there is an overriding concern in the area for mass transportation. Second, there is a need for the mass media to be more creative and innovative, and courageous in presenting the area needs to the public . . . Thirdly, there is a pressing need to use a metropolitan, rather than an individual community approach to provide services to the residents of Central Ohio. Fourthly, there is a need to eliminate pressing problems in the inner city and to strive to improve race relations. Fifthly, . . ., there was a growing concern for improved educational programs and facilities . . . (See Exhibit 3–E, pp. 6–7).

18. In addition to the foregoing, licensees note that on May 21 and 23, 1970, management personnel of the WBNS stations conducted interviews with twelve additional black leaders on related subjects of special interest to the black community. Also, on May 21, 1970, licensees' representatives attended a meeting held by the Mayor and his Cabinet for a briefing on what city officials considered the most pressing problems of the city (Exhibit 3–G). Further, during the first quarter of 1970 licensees hosted luncheon meetings with leaders of eight communities and counties in the Central Ohio area. Specifically, community leader luncheon meetings were held with 17 leaders representing Newark, Ohio and Licking County; 10 leaders representing London, Ohio and Madison County; 9 leaders representing Delaware, Ohio and Delaware County; 11 leaders representing Lancaster, Ohio and Fairfield County; 9 leaders representing Circleville, Ohio and Pickaway County; 14 leaders representing Marion, Ohio and Marion County; 10 leaders representing Chillicothe, Ohio and Ross County; and 18 leaders representing Mt. Vernon, Ohio and Knox County. These community leaders are also identified by name, position and organization (Exhibit 3–A, pp. 2–4) and, further, a brief description of the problems ascertained is given (Exhibit 3–A, p. 4).

19. The licensees further note that on February 1 and 7, 1970, WBNS–TV broadcast a program entitled The Columbus Town Meeting Annual State of the City. This program featured the Mayor of Columbus and his Cabinet answering questions telephoned in from the public. In this respect, licensees submit that they gained additional insight regarding many problems of concern to people in the Central Ohio area. Examples of the questions received are submitted by licensees in Exhibit 3–D of the above-captioned license renewal appli-

cations. Also, in an effort to further ascertain problems of concern to people in their service area, licensees circulated questionnaires among members of the Rotary and Lions Clubs, a sampling of students in twelve high schools, a sampling of the membership of the Junior Chamber of Commerce, and a sampling of students at Franklin University.

20. A review of the above-captioned applications also reveals that a Community Needs Committee, composed of management personnel of the WBNS stations, meets every Monday morning. These meetings concern themselves principally with the consideration of community problems and related programming; i.e., during the meetings staff personnel report their conversations with community leaders and discuss related programming. In this regard, licensees submit in Exhibit 3–E of the above-captioned applications a list of 68 community leaders consulted by staff personnel during the six month period preceding the filing of those applications. These persons are also identified by name, position and organization.

21. Further, in Exhibit 4 of the above-captioned applications, licensees submit a list of problems which the WBNS stations will undertake to deal with during the license term. These problems, in the order presented, include those related to mass transportation, race relations, county-wide (metropolitan) government, welfare, education, convention center, health, law and order, crime, pollution, culture, and consumer protection. Also, in Exhibit 5 of the above-captioned applications, the licensees submit typical and illustrative programs or program series the WBNS stations plan to broadcast during the license term to deal with community problems.

22. Petitioner maintains that, despite the foregoing, licensees have failed to conduct an adequate community survey. In sum, petitioner maintains that blacks are underrepresented in the licensees' ascertainment efforts, noting that only 16, or 12 per cent, of the community leaders consulted were black. Petitioner also submits that licensees have failed to consult with any of the more active groups in the community. Petitioner maintains further that the licensees' ascertainment efforts contain an element of staleness, since many of the consultations with community leaders were conducted between June 1969 and December 1969.

23. Additionally, petitioner maintains that licensees' survey of the general public is deficient. Petitioner initially notes that licensees mailed a questionnaire to four groups in the Columbus area. Petitioner states that two of these groups cater to the white middle class while the other two were student groups. Petitioner also states that licensees do not indicate the number of questionnaires mailed or the number returned. Petitioner also notes that licensees do not list the results of the general public survey.

24. Petitioner goes on to criticize the questionnaire used by licensees in conducting their general public survey. Petitioner notes that, while the questionnaire contained blank lines for additional comments, it asked only one question, namely: "What do you consider to be the most pressing problem confronting Columbus and Central Ohio?". Finally, petitioner submits that the needs ascertained reflect the inadequacy

of licensees' ascertainment efforts, in that the survey revealed mass transportation to be the most pressing problem.

25. As previously noted, on February 23, 1971, the Commission released the final version of its *Primer on Ascertainment of Community Problems by Broadcast Applicants*. On May 20, 1971, licensees filed amendments, copies of which were served on petitioner, to the above-captioned applications, stating:

> On February 23, 1971, the Commission released its Report and Order adopting the Primer on Ascertainment of Community Problems in final form. FCC 71–176. The ascertainment exhibits in the pending applications do not appear fully to comply within Primer requirements, as finally adopted, in certain respects. With respect to the community leader survey, the licensees relied in part on a survey conducted for them by Dr. James L. Golden, Professor of Speech and Communication. The Ohio State University, during the latter half of 1969. The Primer as finally adopted requires that such surveys be conducted by principals or management level employees (Question 11(a)) within six months prior to the filing of the applications (Question 15). With respect to the general public survey, the licensees mailed questionnaires to a randomly-selected group in the service area, requesting that the questionnaire be executed and returned by mail. The Primer in its final form does not authorize this technique.
>
> The licensees have undertaken new ascertainment surveys in order to bring their pending applications into full compliance with Primer requirements as finally adopted. Personal interviews with community leaders have been conducted by management-level employees. Personal interviews with the general public have been conducted by employees under the supervision of management-level employees. The results of these surveys have been incorporated in the enclosed amendments, and they are submitted pursuant to Section 1.522 of the Commission's rules and paragraph 79 of the cited Report and Order.

26. Specifically, during the months of March and April, 1971, licensees conducted two surveys related to the ascertainment of community problems. The first survey concerned interviews with 100 community leaders representing a wide cross-section of the community, including a number of minority group leaders. Each of these leaders was identified by name, position and organization. Forty-one problems were ascertained through these interviews, eighteen of which were listed more than ten times. The three problems recurring with the greatest frequency related to education, race relations, and mass transportation. The general public survey utilized a random sampling technique based upon the telephone directory and resulted in 208 completed interviews. Thirty-one problems were ascertained through these interviews, the five most frequently being mentioned related to those concerned with education, crime prevention and cure, race relations, mass transportation, and the mass media.

27. Petitioner has raised several questions pertaining to the adequacy of the licensees' initial submissions in response to Question 1, Part I of Sections IV–A and IV–B of the above-captioned license renewal applications. We are of the opinion, however, that, while some of petitioner's objections were valid, any question relating to the adequacy of the licensees' ascertainment efforts have been corrected by their survey amendments of May 20, 1971; and, accordingly, we resolve this aspect of the instant proceeding in favor of the licensees.

28. Measured against the standards contained in the *Primer*, it is clear that the material before us discloses on its face that licensees

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have consulted with a representative cross-section of community leaders and a random sample of members of the general public to become informed of community problems. With regard to the allegation that licensees have failed to interview a sufficient number of minority leaders, there is no magic formula for determining the correct number of community leaders to be interviewed. All that is required is a survey of a representative cross-section of community leaders. *Primer*, *supra*, 27 FCC 2d at 667. Here, the licensees have consulted with a number of minority group leaders representing various groups within the black community. With regard to the allegation that these leaders apparently only represent one philosophical element, licensees have broad discretion in selecting from among the leaders of each significant segment within the community. Since the Commission will not substitute its judgment for that of broadcast licensees, no ascertainment issue will arise absent specific evidence that the licensee has abused his discretion in selecting leaders to be interviewed or omitted a significant segment of his service area. *WSBC Broadcasting Company*, 34 FCC 2d 651, 653 (1972). No such showing has been made in this proceeding.

29. The facts in this proceeding also disclose that licensees have evaluated the problems ascertained through its surveys. In analyzing these problems, it appears that licensees have given some consideration to the number of times a problem was mentioned in assessing its relative importance. To meet specified problems, the record also shows that licensees have adopted various types of programs to deal with those problems. In sum, therefore, we believe that the material on hand adequately demonstrates that licensees have realistically and successfully endeavored to ascertain community problems in Columbus and other communities in the Central Ohio area. We also conclude that licensees have effectively evaluated the problems ascertained and propose sufficient programming to deal with those problems which they believe warrant treatment on the WBNS stations. Additionally, we note that licensees, while not required to do so, have set forth an outline of the methods employed by the WBNS stations to remain aware of community problems on a continuing basis. Such efforts cannot go unnoticed for, clearly, a licensee must remain aware of the needs and problems of his community on a continuing basis if he intends to provide the informational programming necessary to serve the public's interest. We can find no fault with the various methods employed by the WBNS stations in this regard. While petitioner criticizes licensees' efforts, petitioner has only made general allegations rather than specific allegations of fact sufficient to show that licensees' efforts have been *prima facie* inconsistent with the public interest. Such allegations are not sufficient to require an evidentiary hearing; nor are licensees required to cull over three years' records to provide evidence of all its ascertainment efforts to refute such general allegations.

Programming to serve the black community

30. Petitioners allege that the stations have failed to present adequate programming for the black community. The basis of this allegation rests on the petitioners' evaluation of a letter dated June 1, 1970,

sent by the licensees to the local chapter of the N.A.A.C.P. In this letter the licensees described certain programs broadcast by the WBNS stations during the past license term which were deemed relevant to the needs and interests of the black community. Petitioners criticize these programs by arguing that "almost all are carried in fringe hours": "Urban League Presents"—12:00 a.m., Sunday, "a time when most people are likely to be in church": "Americans from Africa"—6:30 a.m.; and "I Believe"—7:00 a.m. Further, petitioners complain that other offerings were only "one shot shows." Finally, petitioners aver that the stations do not regularly "present programming on topics which are of general, as well as specific interest to its very substantial Black audience"; that there exists an "almost complete absence of Blacks" from WBNS programming; that when black performers are presented they do not appear in roles with which the majority of blacks can identify; that children's programs have been geared to middle-class white children; and that blacks rarely appear in WBNS commercials.

31. In opposition, the licensees include a copy of the letter referred to above (Exhibit No. 7), stating that the programs listed therein reflect the stations' efforts to meet the needs and interests of the black community. Included among these programs are the following:

WBNS–TV

"The Job Program"----	This series was initiated in January 1968, and has continued on a weekly basis since that time. The program is presented in cooperation with the Ohio State Employment Service, Urban League, CMACAO, N.A.A.C.P., and/or any other agency interested in finding jobs for the unemployed.
"Urban League Presents."	The program began on June 29, 1969, and has been presented weekly since that date. Blacks discuss matters of interest to their community. Co-hosts are Chuck White (WBNS–TV) and Jerry Hammond (Urban League).
"School Scene"----------	This is a weekly series which was begun on January 20, 1969. Discussions are held relating to the services, activities and problems of the Columbus Public School System.
"Aware" ----------	A weekly series initiated in January 1967, these programs are devoted to health, traffic safety, welfare and various other social problems.
"Americans from Africa."	This series was presented in cooperation with WOSU–TV on a weekly basis from October 8, 1969, through April 29, 1970. The series examined the significant contributions made by blacks to American life and culture.
"Nimrod Allen: Born As I Am."	A 30-minute interview with the founder of the Columbus Urban League, broadcast in January 1969.
"Up From Down"------	A report presented on December 23, 1969, detailing the Columbus Metropolitan Area Community Action Organization's efforts to provide training, education, legal aid and counselling to local residents.
"A Slice of Bread"-----	A program broadcast on January 13, 1970, which was devoted to a discussion of black capitalism.
"Prostitution: The Streetwalkers."	A report dealing with the problems of prostitution.

WBNS

"Lighthouse"	This regular series of weekly programs is presented in cooperation with the Columbus Urban League and speaks to the needs and interests of the black community. The series has been carried for more than 25 years.
"Urban Education Coalition Report."	A series of weekly programs devoted to the development of improved instructional programs and facilities in the Columbus Public Schools.
"Minority Report"	A 5-minute CBS Radio Network program which is carried Monday through Friday and covers topics of general interest to the black community.
"Ross Reports/Open Mike".	A weekly series of listener participation programs which deals with community problems, many of which are of particular interest to the black community.

32. With regard to the "fringe hours" argument, WBNS–TV provides an affidavit from the Vice-President in Charge of Programming, wherein he avers that "Americans From Africa" was presented from 7:00–7:30 a.m., not 6:30–7:00 a.m. It is stated that this time period was appropriate since the series was designed to reach college and high school students. Further, the licensee argues that petitioners' general allegation "distort[s] the relevant facts." An affidavit is submitted (Exhibit 8) listing programs which were presented by WBNS–TV from January to September 1970, during prime time and which were relevant to black needs and interests. The following programs were included:

"A Slice of Bread"	10:00–10:30 p.m.—January 13, 1970, Subject—black capitalism.
"Projection 1970"	8:30–9:00 p.m.—January 14, 1970 (Pre-empted CBS's "Beverly Hillbillies"), Subject—mass transportation.
"The Committee"	7:30–8:00 p.m.—February 12, 1970 (Pre-empted CBS's "Family Affair"), Subject—controversy between blacks and Columbus Police Force.
"Fraternal Order of Police."	8:30–9:00 p.m.—February 16, 1970 (Pre-empted CBS's "Here's Lucy"), Subject—Police department's response to the positions taken by The Committee.
"Special Report from the Mayor of Columbus."	7:00–7:13 p.m.—February 19, 1970, Subject—controversy between Columbus Police Department and black residents.
"Mayor's State of the City Report."	9:00–10:00 p.m.—February 7, 1970 (Pre-empted CBS's "Green Acres" and "Petticoat Junction").
"Projection 1970"	8:30–9:00 p.m.—March 16, 1970 (Pre-empted CBS's "Doris Day Show"), Subject—Education.
"Troubles in Transit—Part III."	9:30–10:00 p.m.—March 17, 1970 (Pre-empted CBS's "Governor and JJ"), Subject—mass transit.
"Projection 1970—Urban Systems."	8:30–9:00 p.m.—August 1970 (Pre-empted "Beverly Hillbillies"), Subject—cities' housing, transportation, trash disposal, and other problems.

33. As to programming presented for children, WBNS–TV notes that the station's principal locally-produced children's program broadcast is "Luci's Toyshop," which is described in Exhibit 31. Briefly, the program is designed to provide educational and entertainment experiences for pre-school children. It is stated that any child, regardless of race, color, or ethnic origin can appear on the program; that participants are scheduled strictly in the order of postmark on the letters

addressed to the station requesting tickets; that during 1969, one day was set aside for classes, organizations, etc.; that members of several groups were black; and that special efforts were made to schedule Head Start preschool children.

34. In reply, petitioners concede that the "Americans from Africa" series was televised at 7:00 a.m. rather than at 6:30 a.m., but complain that "[a] 7:00 a.m. time slot is hardly 'prime time,'" and that the programs reflect the creative efforts of Ohio State University, not WBNS–TV. More generally, petitioners complain that WBNS–TV presents no prime time series devoted to the needs and interests of blacks or the problems of race relations, and that most of the programming which is designed to serve the black community is broadcast during "fringe hours." Moreover, petitioners state, an examination of the licensees' opposition reveals that from January to September 1970, WBNS–TV presented only 5¾ hours of programming which was relevant to the black community. Petitioners claim that this amount was not adequate to meet the needs and interests of Columbus blacks. Further, they question whether some of these programs (as well as those broadcast by WBNS and WBNS–FM) were relevant to the black community of Columbus. Rather than being programs of particular interest to blacks, "[m]ost of the programs are *at best* of general interest to Blacks and are mass audience appeal shows." Petitioners also question whether any blacks "participated in a major role in any of these programs." In addition, petitioners refer to the WBNS–TV renewal application (Exhibit No. 5) and condemn "Columbus Town Meeting" and "Issues" programs, stating that of the more than 120 programs broadcast over a three-year period, no more than seven were of special significance to the black community. It is also alleged that only two of the "Channel 10 Reports" (listed in Exhibit No. 9) dealt with blacks; that two other series, "Traffic Court" and "The Judge," which are cited as examples of programming to deal with issues of public importance, should be classified as entertainment programs; and that of the 12 editorials listed in the application (Sub-Exhibit No. 5–A), only one dealt directly with blacks.

35. In response, WBNS–TV cites programs from the "Columbus Town Meeting" and "Issues" series, implying that these, among others, should have been of interest to blacks: "Is Welfare a Right or a Privilege," "Who Will Pay for Higher Education in the Seventies," "Will Stronger Gun Controls Deter Crime," "Does the Consumer Need Government Protection," "Dissent and the Law," "Voting Information," "Where is the Line Drawn Between Individual Rights and Rights of Society," "How Will the Draft Lottery Be Implemented," and "Drugs: Use, Effects and Methods of Treatment." In addition, the licensees argue that "The Judge" is a series which is legitimately classified as programming to serve public needs and interests: actual case histories of violations of law and their disposition are presented; advice for the program is provided by personnel from the Franklin County Court of Domestic Relations; and the program informs the audience about available public service agencies, including Franklin County Chil-

dren's Services, Aid to Dependent Children, Ohio Youth Commission, and Juvenile Detention Center.

36. In their reply to the licensees' response, petitioners argue that even if the nine "Columbus Town Meeting" and "Issues" programs are considered to be of "special significance" to the black community, the total of 16 programs over a three-year period is manifestly inadequate. Moreover, petitioners claim that the programming listed by the licensee was not of "special significance" to blacks; rather, it was only programming of general interest to the total community. Hence, state petitioners, "the charge that WBNS has not ferreted out the particular needs and problems of the significant Black community and broadcast programming geared toward dealing with those specific problems remains unchallenged." Further, the fact that the WBNS–TV cites only one editorial which dealt with problems of the black community "is indicative of WBNS's lack of sensitivity and total unwillingness to serve the interests of Columbus, Ohio."

37. In addition to raising complaints about the stations' overall programming, petitioners criticize certain specific aspects of the licensees' performance. For instance, after citing the fact that unemployment and underemployment rates for blacks are higher than those for whites, they state that WBNS–TV only presents one weekly Saturday afternoon program concerning employment opportunities, while WBNS and WBNS–FM only broadcast "irregular spot announcements regarding employment"; that both the TV and radio presentations are misleading and uninformative in that "[n]o information is given regarding the qualifications for the jobs, the general location of the jobs or the minimum age"; [l]ittle information is given regarding range of pay, usually only the highest rate of pay is mentioned"; and "[o]n the job training, Manpower Development Training and apprenticeship programs are seldom mentioned." Petitioners contend that at least one daily employment program is necessary for the Columbus area. In their opposition the licensees characterize these allegations concerning "The Job Program" as unwarranted. Mr. Charles White, the host of this program, avers that the program is a cooperative effort of WBNS–TV and the Ohio Bureau of Employment Services; that qualifications for specific jobs are broadcast as received from the Ohio Bureau of Employment Services; and that, because the program is designed for the disadvantaged with little education, the emphasis is placed on jobs requiring few or no qualifications. The licensees admit that no information is given concerning the general location of a job, stating that Ohio Bureau of Employment Services, which provides Mr. White with all his information, adheres to a policy of not revealing the employers who offer the jobs. The policy enables the Bureau to conduct a preliminary interview. Further, licensees state that relevant information concerning range of pay is broadcast by Mr. White; that usually the minimum starting salary is reported; and that he never broadcasts only the highest rate of pay. The licensees also state that on-the-job training, Manpower Development Training, and apprenticeship programs are frequently mentioned on both WBNS–TV and WBNS. In addition to the spot announcements concerning employment opportunities,

WBNS Radio broadcasts a program from 8:15–8:30 p.m., Monday through Friday entitled "What's Happening/Need a Job?" Finally, the licensees state their intention to increase the amount of programming devoted to employment opportunities. Petitioners, in reply, contend that the licensees' intention "to upgrade its performance in this area in the coming license period" constitutes an implicit admission of the stations' "deficiencies during the past period."

38. Next, petitioners find fault with the music presented by the AM and FM stations. They state that from May 3 through June 3, 1970, they surveyed the "major portions of the Black community and the Ohio State University area"; that the results of the survey indicated that "WBNS–AM very rarely aired Black performers, especially Black males, and that WBNS–FM never played any contemporary Black performers except of [sic] established, and establishment artists like Louis Armstrong, the Mills Brothers, or the late Nat King Cole." Petitioners also state that, as part of this survey, individuals were asked to name performers whose records they would enjoy hearing; that a tape was made based on the preferences expressed; that the tape was delivered to the WBNS–FM program director, who assured petitioners that station personnel "would listen to the tape and play those numbers which would best fit WBNS' overall format." Petitioners claim that they monitored WBNS and WBNS–FM for the next two weeks and determined that, while "absolutely no contemporary Black artists were played. . . . white performers singing numbers made popular by blacks and white bands doing black orchestrations were broadcast." Subsequently, in response to an inquiry by Mr. Tony Rocciano, one of petitioners' representatives, the program director explained that the music submitted did not suit the stations' formats. Further, Mr. Rocciano states that one of the station's employees told him that the WBNS management believes that "Black musicians and singers have no place on a 'good music station.'"

39. The licensees, in opposition, state that WBNS–FM has recently broadcast the recordings of several of the artists whose works were included in the petitioners' tape, as well as presenting music recorded by other black performers. Furthermore, according to the licensees, the race of an artist is not a factor in the selection; that WBNS stations select performers on the basis of "artistic merit and consistency with an established format." Finally, the licensees argue that WBNS stations do broadcast music by black artists other than those whom the petitioners characterize as "establishment artists." In support of this claim the licensees submit a chart (Exhibit No. 14) showing the names of artists, the race of the artist (if known), and the total number of times the tapes which include that artist were played from May 1 through September 5, 1970.

40. Petitioners, in reply, point to the chart submitted by the licensees and assert that during the "sample period, only 7% (598 out of 7048) of the numbers played featured Black artists," and that of this 7 per cent, "60% are those that would be classified as 'super stars.'" It is argued that in order for a black performer's records to be presented he or she "must gain super stardom," while a white artist need not

possess such qualifications. Petitioners also maintain that "there is a conscious policy of excluding Blacks from the WBNS format." As evidence of this policy, petitioners allege that Mr. William H. Hamilton, a disc jockey, admitted in a telephone conversation that "certain records were removed from their library so they could not be accidentally aired." With regard to this whole issue, petitioners state that they do "not contend that a license should be lost because of differences over particular artists." However, petitioners maintain that this exchange is representative of an overall pattern of exclusion of blacks from the station operations and indicates the difficulties encountered in attempting to bring about even minor changes at the stations. In response, the licensee argues that the fact that 60 per cent of the black selections are performed by black "super stars" raises no issue since "[a] similarly high proportion of the selections of any group would feature super stars. Super stars are super stars because the public enjoys their music. Accordingly, radio stations play a high proportion of their music." The licensees also deny that blacks are excluded from programming.

41. Petitioners next contend that the failure to present programming relevant to the black community is also evident in the licensees' news coverage. In general, allegations are made pertaining to distortion, failure to cover news in the black community by dealing with "credible" news sources, and a deliberate attempt to limit the amount of black-oriented news coverage. Petitions cite by way of example an incident in February 1970 in which a black youth was shot to death by a policeman while allegedly fleeing the scene of a crime. Petitioners maintain that this incident caused a "great commotion" in the black community in view of recent shootings of blacks by the police. Petitioners state that a new organization, The Committee, was formed which gained solid support from the black community. Petitioners allege, however, that the news media still "tried to project a divided Black community" and that WBNS was a contributor to this false impression. In support of this claim petitioners point to a news report on WBNS–TV in February 1970, in which a statement was quoted from one individual while the picture of another individual was shown, and the individual quoted was identified as a spokesman for an organization which he did not represent. Although the NAACP subsequently notified the licensees of this error, petitioners allege that no corrective action was taken. Petitioners also note by way of example that during this same time period members of The Committee were asked to appear on a half-hour special on WBNS–TV to discuss the shooting referred to above, other recent shootings of blacks, and the grievances which were presented to the Columbus City Council. The purpose of this special was to inform the entire Columbus community of the crisis in the black community. Petitioners allege however that members of the media attempted to discredit the credentials of the members of The Committee by questioning their credentials as representatives of the black community. Petitioners also maintain that The Committee was "deliberately prevented from describing the events from their point of view over the airwaves", and ". . . the so-called

television discussion was a clear attempt to conceal and discredit the views of the Black community from the WBNS audience".

42. As a further example of the licensees' failure to cover news in the black community petitioners point to a press conference called by Mrs. Marian Craig, the "acknowledged spokesman for the NAACP in matters relating to education," to announce developments in a school busing crisis. Petitioners contend that because Mrs. Craig is not the head of the NAACP, her authority and competence were questioned, and that neither she nor her remarks were accorded the proper respect. Further, in reporting the press conference, WBNS–TV's announcers merely summarized Mrs. Craig's remarks and then devoted a longer segment, including a filmed interview, to the statement of an opposition spokesman. It is petitioners' belief that this is indicative of the licensees' pattern of presenting only a "short segment or summary of the position of the Black community." Petitioners also rely on the affidavit of a former WBNS–TV cameraman who states that he was criticized by management for using "too much film dealing with the attitudes, views, and complaints of black people."

43. In its opposition, the licensees take issue with the foregoing allegations and contest the factual claims of the petitioners. The licensees explain the mis-identification incident as a mistake which occurred due to a last minute programming change. The licensees maintain that the mistake was corrected the next day by broadcast of the interview with the name correctly superimposed, and that the person interviewed stated that no other corrective action was necessary. With regard to the WBNS–TV half-hour special on which members of The Committee appeared, the licensees maintain that the representatives of The Committee presented their opening statement and responded to questions without interruptions. A breakdown of the program by the licensees shows that The Committee's opening statement and responses to questions consumed over 17 minutes, while the reporter's questions consumed less than 7 minutes. The licensees also state that of 67 questions asked by reporters, 26 pertained to the identity of The Committee spokesmen and whom they represented. The licensees state that such background inquiry was necessary because no biographical data was submitted by The Committee. Furthermore, concerning Mrs. Craig's press conference, the licensees, by affidavit of the reporter who covered the news conference, deny that she was treated in a disrespectful manner. According to the licensees, the reporter arrived at NAACP headquarters without knowledge of who the spokesman would be, and, as a routine matter, asked questions in order to determine the correct name and official title of the spokesman. The licensees deny the allegation of disproportionate coverage of the black community. The policy of the News Director of WBNS–TV in this regard is stated to be as follows: "Whenever anyone or any organization is accused or attacked in a film interview, we will make every effort in fairness to afford time to the named party to reply at the same time, on the same program, if possible. . . . In cases of this kind, all replies are kept as nearly as technically possible to the same length of time as the original statement." Petitioners, in their reply, maintain that the video-

tape submitted by the licensees is evidence of the difference in treatment accorded The Committee and the Fraternal Order of Police on the same issue. The petitioners state that "The former [i.e., The Committee] was treated hostily, negatively, and with suspicion, [while] [t]he police, by contrast, were treated with a sense of reverence." Petitioners reiterate their contention that the newsmen who interviewed The Committee over-emphasized their inquiry into the credentials of the black spokesmen, stating that "only 60% of the program was devoted to substantive issues." Petitioners maintain that the newsmen's lack of familiarity with the spokesmen "indicates the licensees' lack of contact with the Black community." Finally, petitioners, as further evidence of the licensees' alleged failure to provide adequate news coverage of blacks, submit an affidavit from Reverend Percy A. Carter, Jr., who states that the local media did not cover the fire bombing of his home until after he had talked with an important community official. In response to this last point, the licensees contend, by affidavit of the station's news director, that WBNS–TV learned of the event on the morning it occurred; that a news team was assigned to cover the story; that "[a]n unusually long film story concerning the event and interviews of Rev. Carter and two neighbors was presented on the 6:00 p.m. news, the day of the bombing"; that the 6:00 p.m. newscast is the first one of the day to use film shot that same day; that a shorter version of the story was presented at 11:00 p.m.; and that the station was not contacted prior to these newscasts by either Rev. Carter or a "community official."

Discrimination against blacks in programming presentations

44. Petitioners next aver that the licensees have consciously discriminated against blacks in various program presentations. By way of illustration, petitioners point out that the term "niggers" was used by a WBNS sportscaster during coverage in 1967 of a protest by black athletes at Ohio State University. Petitioners state that this sportscaster continues to be employed at WBNS, and has in fact been promoted despite his racist attitude. Petitioners also contend that WBNS has also shown its racist attitude in the use of other terms when referring to blacks. Petitioners state, for example, that "[w]hen Black youths are involved in illegal acts, they are 'Black felons' or 'a mob of blacks' [whereas] white youths tend to be 'juvenile vandals';" that, "Black activists are always 'so called' or 'alleged' leaders representing the 'militant minority' [but] . . . are never spokesmen for legitimate grievances." In opposition, the licensees maintain that news department policy is not to identify anyone by race, except as part of an official police description of a wanted suspect or when an individual or organization desires that specific identity. The licensees also deny the use of any racial slurs such as "Black felons" or "a mob of Blacks." As for the word "militant", the licensees state their belief that many blacks consider this reference a compliment, and no derogatory use of the word has occurred. Further, the licensees maintain that since 1934 there has been a firm policy against the use of terms implying racial or ethnic slurs. Concerning the incident noted above, the sports-

caster involved states that, to the best of his recollection, the incident referred to occurred in 1965 and concerned a black football player at Southern Methodist University. Further, the sportscaster states that he knew the use of such a racial slur was contrary to station policy, and on a subsequent broadcast shortly thereafter apologized for the remark. In reply, however, petitioners point to the lack of any evidence in support of this alleged apology. Petitioners also complain about one of the licensees' news announcers, Mr. Chester S. Long, who, they claim "is the grand master of the art of selecting euphemisms for the word 'nigger,' " and who, through the use of facial expressions and "offensive delivery," demeans black people.

45. Also, for the first time in their reply, petitioners cite another example of racial discrimination, as allegedly practiced by Mr. Bill Hamilton, an announcer on WBNS and WBNS–FM. Petitioners contend that their monitoring of WBNS has disclosed that Mr. Hamilton has established a definite time slot for the airing of a token number of black artists; that this time slot is usually just prior to the news, thus assuring that the "Black record" is cut short. Also it is alleged that Mr. Hamilton, in one instance, made derogatory remarks toward blacks in the form of a word game used as part of his comments after a "Black record" was aired. In their response, the licensees deny that Mr. Long has, in the presentation of the news, demeaned blacks. Mr. Long, by affidavit, denies the petitioners' allegations. The licensees also deny that black artists are relegated to any particular time slot. In this connection, the licensees submit an analysis of the tapes from Mr. Hamilton's show for the month of August 1970 which, licensees maintain, show that of 132 records played immediately preceding the fadeout for news, only eight were black artists. Mr. Hamilton, in an affidavit, also denies any use of racial slurs and indicates that dialogue used by him after playing records is usually based on the lyrics involved. With regard to the word game incident, the licensees contend that "[n]o rational mind could perceive what happened as a racial slur."

Programming for the Columbus community

46. Petitioners recites several current problems confronting the Columbus area such as racial tensions and campus disruptions, and questions how WBNS–TV can be committed to coverage of public affairs while proposing a 20% decrease in news and public affairs programming. Petitioners note that similar reductions are proposed for WBNS and WBNS–FM. The past and proposed programming of WBNS–TV is set forth by petitioners as follows:

[In percent]

	Past	Proposed
News	10.07	8.0
Public affairs	4.1	3.0
All other programs, exclusive of entertainment and sports	12.5	9.6

47. Petitioners state that it is incumbent upon the licensees to affirmatively justify these proposed reductions. The licensees, in their op-

position, stress that these figures represent the "minimum amount of time the applicant proposes to devote normally each week to the program types listed," and that it is their expectation that actual programming in these categories will be approximately the same as that presented during the past license period.

48. Pursuant to the Communications Act of 1934, as amended, a broadcast licensee is required to serve the public interest. To do so, he must ascertain the needs and interests of his community and then present programming to meet those needs and interests. When he comes to the Commission for renewal of his license, he must show (a) that his programming has served his community during the past license term; (b) that he has recently ascertained the problems of his community; and (c) that he proposes programming to meet those problems. In determining whether or not to grant the licensee's application, the Commission will evaluate the reasonableness and good faith of the licensee's efforts to fulfill these obligations. Accordingly, with respect to past and proposed performance, we will not condition action on a renewal application upon a subjective determination of what is or is not a good program; rather, our decision must be based on an analysis of the station's overall programming performance. Therefore, in order to make a *prima facie* case for denial of a renewal application, petitioners must submit specific allegations of fact which, if true, would establish that the licensee's overall past programming could not reasonably have met the needs and interests of the people within his service area, including the black community, and/or that his proposed programming is clearly inadequate to meet those needs and interests.

49. In reviewing a licensee's programming, the Commission recognizes that a large measure of discretion is vested in the licensee. He must determine which problems merit treatment by his station, how much time should be devoted to each problem, and when to present the programming geared to meet those problems. In determining which problems to serve, he may consider the particular format of the station, the composition of his audience, and the programming offered by other stations in the community. Further, no quantitative standards have been set to govern the coverage of a particular issue or problem. Rather, we have recognized that the licensee may be faced with conflicting and competing needs of various groups within his service area. It is his responsibility to determine the appropriate response. "[H]e may not flatly ignore a strongly expressed need; on the other hand, there is no requirement that a station devote twenty per cent of its broadcast time to meet the need expressed by twenty per cent of its viewing public." *Stone* v. *F.C.C.* D.C. Cir. Case No. 71-1166, Slip op. at 18-19 (June 30, 1972). Further, when determining the amount of programming presented to serve a particular group's needs (here the black community's), the Commission will not necessarily ignore a program which is devoted to a problem which concerns Columbus residents in general, rather than blacks in particular, for we have stated that

> many types of programming cannot be broken down into that for black people and that for others. Were the Commission to require such a breakdown of programming according to the racial composition of the city of license, we would

effectively be prohibiting the broadcast of network and other nationally presented programming. Without addressing ourselves to the legality of such a requirement, it is sufficient to say that such 'separate programming' is not feasible. See also our discussion of this matter in *Capitol Broadcasting Co.*, 28 FCC 1135 (1965).

The Evening Star Broadcasting Company (*WMAL*), 27 FCC 2d 316, 332 (1971), *aff'd sub nom. Stone* v. *F.C.C.*, *supra*. Finally, questions will not be raised about the scheduling of programs to meet community problems absent a showing that the licensee could not reasonably expect that the broadcasts will be effective. While it is true that they have an obligation to schedule some informational programming for prime-time hours,

> . . . licensees have discretion to schedule this type of programming in other hours when it may face less competition from the more broad-appeal entertainment programming available during [prime time]. Hence, the Commission has consistently called upon broadcasters to exercise their prudent judgment in determining the problems of the communities they are licensed to serve, and the amount, kind and time-periods during which nonentertainment programming should be presented to provide for those problems.

Time-Life Broadcast, Inc., 33 FCC 2d 1081, 1092 (1972).

50. In light of the foregoing considerations, we evaluate the past programming of the licensees. In each instance it should be remembered that the Commission will not second-guess the licensees' decisions unless they appear to have been unreasonable.

51. *WBNS-TV.* Several of the public affairs series dealing with issues of importance to the residents of Columbus have been described above. In addition, the licensee's renewal application provides a detailed description of typical and illustrative programs and program series broadcast during the past license term which served public needs and interests (Exhibits Nos. 8, 9, 11 and 11–A). While we do not find it necessary to recite all this information here, a list of some of the topics covered by these programs should prove helpful: the Middle East; welfare, refuse disposal; school bond issues; Vietnam; higher education; auto insurance; Social Security; collective bargaining by public employees; water pollution; gun control; Columbus Model City Program, consumer protection; local elections; mass transportation; juvenile delinquency; prison reform; taxes; birth control; law enforcement; Nigerian-Biafran War; obscenity; sex education; civil rights; housing; drug abuse; air pollution; and mental health. Among the regular public affairs programs presented by the station are the following: "Face the Nation"; "Columbus Town Meeting"; "Gleba Report"; "60 Minutes"; "The Judge"; "Man from Cosi"; "Aware"; "The Job Program"; "School Scene"; and "Urban League Presents." The station has also presented special programs, both locally and network produced, and "mini-documentaries" in order to meet particular needs and interests.

52. With regard to petitioners' concern about programming specifically directed to blacks, we note that the station has presented "Americans from Africa" and "Urban League Presents." Among the topics discussed on the latter series were the following: model cities; police-community relations; the N.A.A.C.P.; law enforce-

ment, students' rights; Afro-Am; the Columbus Public School System; and welfare (three programs). Further, as mentioned above, the station has televised "specials" and individual programs from other series which were devoted to matters directly affecting the black community. We also note that these programs have been broadcast at various times throughout the week.

53. *WBNS.* Again, several of the station's public affairs programs have been described above. Also, the licensee's renewal application provides a detailed description of typical and illustrative programs and program series broadcast during the past license term which served public needs and interests (Exhibit No. 9). Many of the same topics covered by the programs carried on WBNS–TV were also discussed on the AM's broadcasts. Further, with regard to petitioners' interest in programming specifically directed to blacks, we note that the licensee presents "Lighthouse" each week, along with the network produced "Minority Report."

54. *WBNS–FM.* The licensee states that this station provides a stereo musical broadcasting service, including presentation of the Columbus Symphony Orchestra. While the station's renewal application indicates that the licensee relied primarily on news and public service announcements to meet community needs, it is stated that the station has included certain public affairs which were broadcast by the AM station—"Ross Reports," "Columbus Town Meeting," "The Issue," "Urban Education Coalition Report," and "Lighthouse." Accordingly, the licensee's analysis of the programming broadcast from February 1 through February 28, 1970, discloses that 1.67 percent of the station's total time on air was devoted to public affairs programs. Further, it is stated that the FM station presented these programs in time periods other than those during which the original (AM) presentations were broadcast, thereby increasing the size of the potential audience for these series. With regard to news programming, the licensee states that during certain periods of time the AM's programming is duplicating and that the station relies on the AM news staff. It is also noted that on July 29, 1969, WBNS–FM added to its schedule the American Broadcast Company FM Network News, and, on January 12, 1970, incorporated a daily local-regional news summary which is presented at 6:15 p.m., Monday through Friday.

55. On the basis of the foregoing, we conclude that the licensees' overall programming service has adequately met the needs and interests of the Columbus area. In reaching this determination, we find that the licensees have made reasonable efforts to serve the black residents of the service area. Additionally, we have before us no information to substantiate petitioners' general allegations regarding the presence and characterization of blacks in the stations' programming and commercials. On the basis of the unrefuted information provided by the licensees with regard to the programs presented during the past license term, we cannot agree that there exists an "almost complete absence of Blacks" from WBNS programming. Furthermore, petitioners have failed "to indicate whether non-blacks

are accorded different, more positive treatment" than whites. *Stone* v. *F.C.C., supra*, Slip op. at 20.

56. With reference to the specific programming issues raised by petitioners, we similarly find that no hearing is warranted. We find that the licensees have adequately rebutted the allegations made regarding the stations' employment programming. As noted above, the licensees have wide discretion to determine when and how a particular problem should be met. We do not find that WBNS's decision not to present a daily employment program constitutes an abuse of that discretion; the stations have reasonably addressed the problem with the programming outlined above. Also, we find no merit to petitioners' argument concerning the licensees' intention to increase the stations' employment programming. Were we to treat a proposed programming change as an admission of past failure in the absence of evidence to indicate that the broadcaster had neglected the problem, we would effectively deter the improvement of broadcast programming.

57. As to the petitioners' complaints about the radio stations' musical formats, we note that the Commission's review of a renewal applicant's performance focuses on the informational programming which he has offered to meet community problems. We have disdained consideration of entertainment formats in this context. In doing so, we have not ignored the fact that most radio stations follow specialized formats which, of necessity, do not each appeal to all segments of the community; that each station's entertainment presentations do not reflect all the various "life styles" that exist within the service area. Hence, we note that of the remaining 10 commercial stations in Columbus (five AM and five FM) five offer substantial schedules of soul, rock, underground and/or jazz, three offer country and western, and two provide background music. Nevertheless, we have framed our ascertainment and programming requirements only in terms of community problems. See Stone v. F.C.C., supra, at 20, N. 44. Accordingly, we will not at this time embark on a case-by-case evaluation of entertainment formats. Further, we find that the licensee has successfully rebutted the petitioners' allegations of discrimination by demonstrating that the records of black performers whose styles are consistent with the stations' formats are presented.

58. We are also of the view that petitioners have raised no question of fact regarding the licensees' coverage of news events. The licensees, in our opinion, successfully rebutted the allegation that they distorted news by failure to deal with "credible" news sources, and that they attempt to limit the amount of black oriented news coverage. As previously noted, a licensee has wide discretion in the area of programming, and there has been no showing that this discretion has been abused. The pleadings established that the licensees did, in fact, present news coverage of events deemed of importance by petitioners. Further, with regard to petitioners' allegations concerning the nature and extent of this coverage, as we stated in *Universal Communications Corporation*, FCC 71–234 (March 3, 1971) "a pattern of disagreements is not a pattern of distortion." In this latter regard, we have held that

Commission action is not warranted absent extrinsic evidence of deliberate distortion of the news; that the government should not interfere with the free exercise of journalistic judgment; and that the Commission is not the national arbiter of the truth. *In re Complaints Concerning CBS Program, Hunger in America*, 20 FCC 2d 143 (1969). Similarly, to determine whether questions are relevant to the most important issues requires a subjective judgment. Just as this Commission will not decide what is or is not a good program, we will not interfere with the exercise of the licensee's news judgment in order to decide what is or is not an appropriate line of questioning.

59. As to the allegation that the licensees have discriminated against blacks, petitioners cite the sportscaster's use of the word "nigger," the conduct of the radio disc jockey, and the "offensive delivery" of a newsman. We cannot agree that these matters should be explored in the hearing process. The use of the racial slur appears to have been an isolated incident and an apology was apparently forthcoming; petitioners have presented no substantiation of their claim that "Black records" are relegated to specific time slots; nor have they convinced us that the "word game" mentioned above (par. 45) was racially motivated; and this Commission cannot, without some evidence of a pattern of different treatment, designate a renewal application for hearing on a discrimination issue on the basis of our subjective judgment of a newscaster's "delivery."

60. Petitioners also complain about the licensees' proposed programming, stating that no justification has been offered for the reduction in the amount of informational programming to be presented during the coming license term. Initially, it is observed that Question 14 of Section VI–A and Question 12 of Section VI–B of FCC Form 303 request renewal applicants to state the minimum amount of time they propose to devote normally each week to the programming categories of News, Public Affairs, and All other programs, exclusive of Entertainment and Sports. In 1967 licensees proposed to devote the following amounts of time to these programming categories:

[In percent]

	WBNS	WBNS-FM	WBNS-TV
News	14.9	7.5	6.0
Public affairs	2.7	[1] 2.5	4.1
All other	8.1	----------	12.0

[1] Public service announcements.

The pending renewal applications for WBNS–AM–FM–TV disclose that licensees propose to devote the following minimum amounts of time to these programming categories normally each week:

[In percent]

	WBNS	WBNS-FM	WBNS-TV
News	12.0	6.0	8.0
Public affairs	3.0	1.5	3.0
All other	7.0	2.0	9.6

Thus, while licensees propose slight reductions in some categories, they also propose slight increases in other categories. With specific reference to petitioners' allegation, the mere citation of what is deemed to be an insufficient amount of programming in these categories, without any evidence to support the assertion that such performance will fail to serve the public interest, is insufficient to raise a substantial and material question of fact as to whether a station will serve the public interest. It also appears that petitioners' allegation is based on a comparison of the amount of time licensees propose to devote to these programming categories and the amount of time actually devoted to these programming categories during the past license term. Again, we note that the license renewal application calls for the *minimum* amount of time the applicant proposes to devote to these programming categories. The figures proposed are, of course, not inflexible or fixed. In this respect, it has been our experience that licensees will often exceed their proposals in some categories and not quite meet their proposals in other categories. In the absence of substantial variations, no question of promise versus performance will arise. There is no such question in this proceeding. Hence, it is observed that WBNS–TV's pending renewal application discloses that the station actually devoted 10.07%, 4.1%, and 12.5%, respectively, to the program categories of News, Public Affairs, and All other programs, exclusive of Entertainment and Sports. It is also observed that WBNS's pending renewal application discloses that the station devoted 15.23%, 3.74%, and 9.42%, respectively, to these programming categories, and that WBNS–FM's renewal application discloses that the station devoted 4.3% of its broadcast time to News and 9.42% of its broadcast time to All other programming, exclusive of Entertainment and Sports. Additionally, WBNS–FM broadcast on the average of 271 Public Service Announcements per week; and, as noted in paragraph 54 above, an analysis of WBNS–FM's programming from February 1 through February 28, 1970, discloses that 1.67% of the station's total time on the air was devoted to Public Affairs programming. We conclude, therefore, that petitioners have also failed to raise a substantial and material question of fact with regard to this aspect of licensees' proposed programming.

61. Finally, one other matter regarding the stations' programming warrants brief comment. Each of the parties request that the Commission view certain video tapes submitted by the licensees. The licensees believe that the tapes will serve to substantiate their assertion that the WBNS–TV has reasonably and fairly dealt with the problems faced by the black community; petitioners, on the other hand, maintain that the tapes reveal that blacks have been accorded unfair treatment by the station. We do not believe that it is necessary to view these tapes. The record clearly demonstrates that petitioners have failed to establish a substantial and material question of fact concerning the licensees' alleged discriminatory conduct. Moreover, both the petitioners and licensees are attempting to place this Commission in the role of a censor. Section 326 of the Communications Act prohibits us from assuming that role.

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Employment

62. On June 4, 1969, the Commission adopted rules providing that licensees must afford equal opportunities in employment and that no person shall be discriminated against in employment because of race, color, religion, national origin or sex. *Nondiscrimination in Broadcast Employment*, 18 FCC 2d 240 (1969). Petitioner maintains that licensees discriminate against blacks in their employment practices. Petitioner notes that WBNS–TV employs 211 persons. Petitioner states, however, that out of this total only 13, or 6.1 percent, are black. Petitioner also states that of WBNS–TV's black employees, only three (3) have duties that require them to appear on camera and only one has management responsibilities.

63. Petitioner also submits that none of WBNS–TV's black employees enjoy a policy making position or a position of upward mobility. Petitioner states, in this latter connection, that the employment experience of Roosevelt Carter is illustrative. Petitioner submits that, although Mr. Carter found his work at WBNS–TV satisfying, Mr. Carter left the station when it became clear that he was at the end of a blind alley. Petitioner also submits that Mr. Carter did not leave WBNS–TV to accept a better position as implied by licensees in a letter dated June 1, 1970, to Otho Ball, but, rather, left the station because a white man with less experience and ability was hired to ultimately assume the post of Day News Editor. Petitioner further submits that Mr. Carter took a cut in pay when he left WBNS–TV to accept a post with the Metropolitan Area Church. Finally, petitioner submits that it can find no evidence that licensees actively recruit black personnel.

64. In opposition, licensees maintain that they do not discriminate against black applicants and employees. Licensees note that the WBNS stations, exclusive of custodial personnel, presently employ 15 black persons. These persons and the positions they occupy are set forth in Exhibit No. 23 of licensees' opposition pleading as follows:

WBNS

Paul White—News Department—Sports Cameraman/on the air talent.
Curt Luckett—Announcing Staff—On the air announcing.
Charles G. Hammond—Talent Staff—Co-Host: THE URBAN LEAGUE PRESENTS.
Ralph Robinson—Film Editing—Film Editor.
Nathaniel Tailiver—Floor Director—Set Up/liason between talent and director.
Karlos Fulton—Floor Director—Set Up/liaison between talent and director.
Jerome Pradler—Receptionist—PBX Operator/Receptionist.
Sandra Byers—Film Editing—Film Editor.
Jeffrey Thompson—Receptionist—PBX Operator/Receptionist.
Phyllis Wright—Computer—Former Head of Traffic Department. Now Computer Coordinator.
Charles White—Public Affairs Talent—Public Affairs/Talent.

WBNS–AM

Robert Jeffrey—News Department—Sports Cameraman/On the Air FM newscast.
Sandra Grant—Record Department—Keeping Record Catalogue.
Robert Pardon—Receptionist/Announcer—PBX/Receptionist/Night Time Announcer.
Jackie Thomas—Receptionist—PBX/Receptionist.

65. Licensees also submit as Exhibit No. 24 of their opposition pleading information pertaining to the establishment and operation of the Broadcast Skills Bank. This Bank concerns itself with recruitment of minority persons for broadcasting, their placement and employment within the industry—full or parttime, their training—where needed, and their advancement within the industry. Licensees note that through the Broadcast Skills Bank 27 blacks have been placed in broadcasting, eight of whom have been employed by the WBNS stations. Licensees also submit as Exhibit No. 25 of their opposition pleading information pertaining to their initial program to insure equal employment opportunities for minorities.

66. Concerning Mr. Carter, licensees note that he was hired in May 1964 as a reporter-cameraman and left the station in April 1967. Licensees states that, at the time of his departure, Mr. Carter's salary was $7,048.00 per year (Opposition, Exhibit 26–A), and that his starting salary with the Metropolitan Area Church Board was $9,226.89 per year (Opposition, Exhibit 27). Licensees also deny that Mr. Carter was discriminated against. Licensees submit, in support of their position, a letter written by Mr. Carter to WBNS–TV just prior to his departure (Opposition, Exhibit 29). Licensees also submit as Exhibits 16 and 28 affidavits of Thomas W. Dorsey, News Director at WBNS–TV, and Stanley Vingle, Documentary Photographer at WBNS–TV, which relate to Mr. Carter's job performance and qualifications.

67. In reply, petitioner restates its charge that licensees employ an insignificant number of blacks, particularly in positions of responsibility. Petitioner also states that the Broadcast Skills Bank is a sham designed to gloss over the licensees failure to actively recruit blacks. Petitioner further submits that the facts surrounding Mr. Carter's departure are in dispute. In this respect, petitioner submits an affidavit executed by Carter wherein he maintains that the position of day editor did not require the skills in which he was allegedly deficient, that the person chosen for the position did not have the requisite skills, and that the deficiencies in his work were never mentioned to him while employed by WBNS–TV.

68. Licensees, in their response to petitioner's reply, state that, as of December 7, 1970, twenty-five of the WBNS stations' 183 full-time employees, or 13.7 per cent, were black; that during the past license term approximately 20 per cent of new employees hired were black; that these employees hold a wide range of jobs, and that the increase in black employees is largely attributable to the Broadcast Skills Bank. With further regard to Mr. Carter, licensees submit that his affidavit reflects a misunderstanding of his responsibilities while employed by WBNS–TV. In this respect, licensees submit another affidavit of Mr. Dorsey wherein the job responsibilities of a news editor are outlined.

69. We have stated that in order to challenge a licensee's equal employment opportunity program or show non-compliance with the Commission's rules, a petitioner must demonstrate with some degree of specificity that the licensee's employment policies and practices contain barriers to equal employment opportunity or that the licensee has

in fact discriminated against applicants and employees because of race, color, religion, national origin or sex. *Time-Life Broadcast, Inc.*, 33 FCC 2d 1050, 1059 (1972). We conclude, based upon our review of the pleadings herein, briefly summarized above, that petitioner has failed to establish with the degree of specificity necessary facts sufficient to show that licensees have discriminated against black applicants and employees.

70. Petitioner relies, in part, upon statistical data to support its charge of employment discrimination. We have at no time indicated that fully proportional employment of minorities is called for by our rules. Fair employment practices will not necessarily result in the employment of any minority group in direct proportion to its numbers in the community. *Nondiscrimination in Employment Practices of Broadcast Licensees*, 23 FCC 2d 430 (1970). We have also stated that simply indicating the number of minorities employed, without showing specific instances of discrimination or a conscious policy of exclusion, is insufficient to require an evidentiary hearing to explore the licensee's employment policies and practices. *The Evening Star Broadcasting Company (WMAL)*, 27 FCC 2d 316 (1971), *aff'd sub nom. Chuck Stone* v. *Federal Communications Commission*, D.C. Cir., Case No. 71–1166, Slip Opinion, June 30, 1972, *rehearing denied* September 1, 1972. While an extremely low rate of minority employment may raise questions requiring appropriate administrative inquiry, *Chuck Stone* v. *Federal Communications Commission*, *supra*, the facts herein disclose that the WBNS stations do employ minority personnel in responsible positions and that the percentage of such employees approaches the number of minorities in the Columbus metropolitan area.

71. Initially, we note that the 1970 census, General Population Characteristics, PC(1)–B Series (October 1971), discloses that, while 18.5 per cent of the Columbus population is black, 12.5 per cent of Franklin County is black and 11.6 per cent of the Columbus Standard Metropolitan Statistical Area is black. At the time the pleadings herein were filed the WBNS stations employed 15 blacks in other than custodial positions. This represents 8.3 per cent of their total workforce. We also find noteworthy information revealed in the 1971 and 1972 annual statistical profile reports (FCC Form 395) for the WBNS stations. These reports disclose that the WBNS stations employed 18 minority persons in 1971 out of a total workforce of 188 persons, and that in 1972 the stations employed 17 minority persons out of a total workforce of 170 persons. Thus, minority persons represented 10 per cent of the licensees total full-time workforce in both 1971 and 1972. We conclude, therefore, that the composition of the WBNS stations' minority staff falls within a range of reasonableness when compared to the percentage of minorities in the stations' service areas.

72. We also respectfully disagree with petitioner's conclusions regarding licensees effort to recruit minority personnel. In support of this charge, petitioner merely offers general criticisms of the Broadcast Skills Bank. Licensees, however, have submitted information disclosing that approximately 20 per cent of new employees hired

during the past license term were minorities and, further, that the increase in minority employees is largely attributable to the Broadcast Skills Bank. We also conclude, therefore, that the licensees are making reasonable and good faith efforts to recruit minority personnel.

73. Finally, we also respectfully disagree with petitioner's allegation regarding Mr. Carter. We have stated that not every complaint of an isolated action, even if substantial, will warrant deferring a renewal or designating a renewal application for hearing. Rather, action will be warranted only where we find a pattern of substantial failure to accord equal employment opportunities. *Non-Discrimination in the Employment Practices of Broadcast Licensees*, 18 FCC 2d 240, 241–2 (1969). Accordingly, even if accepted as true, the allegations related to Mr. Carter's employment status with WBNS–TV, standing alone, does not establish a pattern of discrimination, particularly when viewed in light of the efforts made by licensees to recruit minority personnel. Nor has the petitioner submitted any facts to indicate that the licensees' employment practices contain artificial barriers to equal employment opportunities. We conclude, therefore, that no further action is warranted on this aspect of the petition to deny.

Media control—anticompetitive practices

74. Petitioner maintains that the principals of the licensees enjoy a monopolistic position in the Columbus media market in contravention of the Communications Act. Petitioner also maintains that the licensees have engaged in certain anti-competitive practices. Petitioner submits, therefore, that the above-captioned applications must be designated for hearing. Again, we respectfully disagree.

75. Petitioner, in support of its position, initially refers to the broadcast and non-broadcast holdings of the licensees' principals. Hence, petitioner notes that licensees' principals own not only the WBNS stations, but also, the Bancohio Corporation, a bank holding company that extends credit to commercial enterprises and private borrowers. Petitioner notes further that licensees' principals own and control the Dispatch Publishing Company, publisher of two daily newspapers and a Sunday newspaper in Columbus.

76. Licensees, in opposition, refer to the existence of numerous other print and broadcast media in the Columbus area. Hence, licensees note that Columbus has three VHF television stations and one UHF educational television station. Licensees also note that there is presently pending before the Commission application for a commercial UHF television station for Columbus. Licensees note further that there are 15 AM or FM stations in Columbus and 11 other AM or FM stations within a 25 mile radius of Columbus.

77. Concerning the print media, licensees note that Columbus has two daily newspapers, *The Columbus Dispatch*, owned by licensees, and *The Columbus Citizen Journal*, owned by Scripps-Howard. Licensees also note that within Columbus and its suburbs there are 14 other neighborhood weeklies circulating from 3,200 to 34,000 copies each publication date. Licensees go on to refer to other newspapers in the Columbus area and then conclude that, of the diverse media in the

area, licensees' principals own one television station, one AM station, one FM station, and one newspaper. Licensees state, in this latter connection, that the operation of the WBNS stations are completely independent of the operations of *The Columbus Dispatch*.

78. As we have held in the past, absent specific evidence of abuses arising from the multiple ownership of broadcast stations or the common ownership of broadcast facilities and newspapers, any action in this difficult and complex area is more appropriately the subject of a rulemaking proceeding. *Hale* v. *F.C.C.*, 425 F. 2d 556, 559–560 (1970); *Chuck Stone* v. *F.C.C.*, *supra; Federation of Citizen Associations—D.C.*, 21 FCC 2d 12 (1970). Such a rulemaking proceeding has been issued, and, accordingly, we see no reason on the basis of the foregoing to depart from this practice in the present proceeding. Petitioner, however, seeks to distinguish this proceeding by citing examples of certain alleged anti-competitive practices by the licensees. Our review of these alleged instances of abuse leads us to conclude that they are largely conclusions unsupported by specific facts. We also conclude that the licensees have adequately explained each of the alleged anti-competitive practices.

79. Hence, petitioner submits that *The Columbus Dispatch* gives licensees' television listings more favorable treatment than those of other Columbus television stations. Petitioner also implies that *The Columbus Dispatch*'s television listings were changed in a manner ". . . seemingly . . . in retribution to Channel 4" after that station broadcast interviews concerning a prospective economic withdrawal of the newspaper by the black community. No facts are submitted in support of these charges, however. On the other hand, licensees submit an affidavit of the Executive Director of *The Columbus Dispatch* wherein he denies petitioner's charges, explains the format for the newspaper's television listings, and submits a copy of that format as carried in the newspaper.

80. Petitioner also contends that during a program broadcast on WBNS–TV in 1967 the Housing Director of the Urban League criticized licensees' principals for allegedly blocking the creation of a black bank. Petitioner asserts that, after the broadcast of the program, licensees attempted to force the Urban League to pay for the program on the ground that it involved a solicitation for support for the mortgage company; that, unable to make the Urban League pay for the program, the time slot of the program was changed despite its established constituency at that hour; and that, due to pressure by licensees, the Housing Director was forced to resign his position with the Urban League. In opposition, licensees first state that the Urban League was never asked to pay for the program in question. Licensees also submit a letter from the Executive Director of the Urban League wherein petitioner's charge regarding the change in the program's time slot are characterized as unfounded. Concerning the resignation of the Urban League's Housing Director, the Executive Director's letter states in pertinent part:

> Secondly, Mr. Cleveland's innuendo to the extent that WBNS Radio could have played a part in his being asked to resign from this agency is untrue, irre-

sponsible and juvenile. Neither WBNS Radio nor any other outside forces played any part in the operation of the Urban League—only the Board of Directors of the agency has this role.

81. Based on the foregoing, we conclude that petitioner has failed to submit with any degree of specificity facts which would disclose an abuse by the licensees' principals of their joint ownership of the WBNS stations and *The Columbus Dispatch*.

Conclusions

82. Section 309(d) of the Communications Act provides for the grant of a license renewal application where the Commission finds, after full consideration of all pleadings, that there are no substantial and material questions of fact and that a grant of the application would be consistent with the public interest. Section 309(d) also provides that where a petition to deny is filed it must contain specific allegations of fact sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest. Where the Commission finds that such a showing has not been made, it may deny the petition. Accordingly, based upon our review of the above-captioned license renewal applications and all the pleadings filed in this proceeding, we find that the Columbus Broadcasting Coalition has failed to raise a substantial and material question of fact which establishes a *prima facie* case for denial of WBNS–AM–FM–TV's licenses. We also find that a grant of the above-captioned license renewal applications for Stations WBNS, WBNS–FM and WBNS–TV would serve the public interest, convenience and necessity.

83. In reaching our conclusions, we are not unaware of the concern being expressed by the Columbus Broadcasting Coalition and other minority groups about the responsiveness of the broadcast media to their problems. Hence, we note with concern the fact that petitioners herein have filed petitions to deny the license renewal applications of a number of stations located in Columbus, Ohio. We also note with concern that similar petitions have been filed against many other stations in cities other than Columbus. The Commission, of course, cannot waive or ignore the pleading standards set forth in Section 309(d) to accommodate petitioners. Clearly, if members of the public choose to wait until the end of a license term and then petition to deny renewal of license, they must meet the strict requirements of Section 309(d). This does not mean however that members of the public are left without the means to improve local broadcast service. We have found that cooperation at the local level is the best and most effective method of resolving local problems and improving local service. Accordingly, we wish to reaffirm our prior expression of policy approving community-broadcaster discussions throughout the license term. Obviously, while under an obligation to ascertain and program for community problems, no broadcaster can be aware of everyone's needs all the time. Therefore, interested citizens who feel a station's performance is inadequate should so advise the broadcaster to provide him the opportunity to consider their ideas and suggestions. Such

discussions will, of course, be more effective if conducted throughout the license term and not only at renewal time. Such was not the case herein.

84. In view of the foregoing, IT IS ORDERED, That the petition to deny filed by the Columbus Broadcasting Coalition IS DENIED.

85. IT IS FURTHER ORDERED, That the above-captioned applications for renewal of licenses for Stations WBNS, WBNS–FM and WBNS–TV, Columbus, Ohio, ARE HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

Here is another chapter in the never-ending saga of how the Federal Communications Commission repeatedly turns its back on the public. Today, in the face of some very serious challenges, the majority renews the licenses to WBNS–AM–FM and TV, Columbus, Ohio, and dismisses a petition to deny filed by the Columbus Broadcasting Coalition.

RadiOhio, Inc. holds the license to stations WBNS–AM and FM. WBNS–TV, Inc., holds the license to WBNS–TV. The two licensees are under common ownership. Though a number of important questions are raised concerning these licensee's basic qualifications, I shall focus my discussion on the majority's treatment of only two such issues: discriminatory employment practices and concentration of media control.

First, petitioners charge the licensees with racially discriminatory employment practices. If true, such a charge would certainly raise very serious questions about the licensees' qualifications. Naturally, the licensees deny that they have discriminated. And, as usual, and as always inexplicably, the majority believes the licensees, and notes that petitioners have failed to present enough information to warrant a hearing.

Surprisingly, the licensees themselves have introduced their stations' equal employment reports (FCC form 395). Those reports indicate a *decline* in the number of blacks employed by the stations between 1971 and 1972. Under our current approach to equal employment opportunities, the presence of such a decline would normally demand that we inquire further of the licensees. *See Pennsylvania-Delaware Renewals*, 36 FCC 2d 515 (1972). Here, however, the majority does not even acknowledge that the licensees' forms 395 reveal a decline in the number of blacks employed during the past couple of years.

Further, and perhaps even more disturbing, after conceding that petitioners might well have alleged sufficient facts to indicate that WBNS–TV has, indeed, discriminated against at least one black employee, the majority nevertheless refuses to designate that question for hearing. Apparently, the majority has adopted the peculiar position that in order to merit a hearing on the question of a licensee's employment practices, the complainant must first *prove* a pattern of

discrimination. Passing the troublesome, and as yet unanswered, question of just how many instances of discrimination are necessary before we have a "pattern," if a petitioner must establish the existence of such a pattern in order to obtain a hearing on the issues, what purpose will be served by the hearing? In short, the majority demands that in order to get a hearing, the petitioner prove, *prior* to a hearing, that which can only be proved through a hearing.

In my opinion, the licensees' forms 395, when coupled with the allegations concerning the instance of discrimination to which the majority, itself, refers, constitute the sort of factual allegations which show that the grant of these renewal applications would be *prima facie* inconsistent with the public interest. Under *Stone* v. *FCC*, —— F. 2d ——, 24 RR 2d 2105 (D.C. Cir. 1972), a hearing is mandated in such circumstances. Not only does the majority disagree with this conclusion, it also declines completely to investigate further—even for purposes of possible forfeitures—the one instance of employment discrimination which it seems to acknowledge.

I would also designate for hearing the question concerning concentration of media control. Aside from owning two radio stations and one VHF station in Columbus, the licensees' principals own Columbus newspapers. There is some dispute about the scope of this print media ownership. Petitioners say the licensees' principals own the Dispatch Publishing Co. which owns two of Columbus' daily papers and a Sunday paper. The licensees say their principals own one of Columbus' two daily papers. The majority does not even acknowledge this discrepancy.

The majority notes, further, that it will not make an *ad hoc* inquiry into a concentration of control issue unless the complainant alleges the existence of abuses arising from such concentration. *See Hale* v. *FCC*, 425 F. 2d 556 (D.C. Cir. 1970) ; *see also Application of Chronicle Broadcasting Co.*, 17 FCC 2d 245 (1969). In the instant case, the petitioner has alleged such abuses. First, petitioners contend that the licensees' newspaper tends to favor the licensees' TV listings over those of its competitors. Second, petitioners contend that the licensees' attempted to censor the Urban League's Housing Director when he charged, during a WBNS–TV broadcast, that the licensees' principals were racist.

Amazingly, the majority simply chooses to disbelieve both these charges. At the very least, the allegations and the subsequent licensee denials have raised questions of fact which cannot possibly be resolved absent a hearing.

I dissent.

F.C.C. 72-1178

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
RE-REGULATION OF RADIO AND TELEVISION BROADCASTING

ORDER

(Adopted December 20, 1972; Released December 29, 1972)

BY THE COMMISSION: COMMISSIONER WILEY ISSUING A SEPARATE STATEMENT.

1. By Order adopted November 1, 1972 (FCC 72-967), the Commission amended certain rules which, as a result of its study looking toward re-regulation of radio and television broadcasting, were considered no longer necessary in their existing form.

2. Our continuing re-regulation study indicates that further such amendments are in order.

3. The amendments herein eliminate a number of station reporting, record-keeping and operating requirements. Individually, they may be minor but, collectively, they become unnecessarily burdensome on the licensee and, in many cases, on the Commission.

4. We believe that the amendments will contribute to the more orderly dispatch of business by the Commission and its licensees in meeting their responsibilities for serving the public interest.

5. The following changes will be made in our rules and regulations:

(a) The requirements that an auxiliary transmitter must be tested at least once a week, and at specified hours, are eliminated. If the licensee determines that testing is necessary, it can be done any time (§§ 73.63(d); 73.255(d); 73.555(d); 73.638(d)).

(1) It is sufficient to specify, as the existing rule does, that the auxiliary transmitter may be used only if it is in proper operating condition and adjusted to the licensed frequency. How often any testing is deemed necessary for an auxiliary transmitter—and the time of day it is done—can be left to the licensee's judgment. Present limitations on test hours are inconsistent for the various broadcast services, and, in the case of AM and FM services, are unnecessarily restrictive.

(b) Provision is made that an auxiliary transmitter licensed for lower power than the regular transmitter can be operated in excess of the auxiliary's licensed power (but at not more than 105% of the regular transmitter's licensed power). (§§ 73.63(g); 73.255(f); 73.555(f).)

(1) The licensed power of many auxiliary transmitters is less than the licensed power of the regular transmitter. In such case, there is no adverse effect from operation of the auxiliary with power in excess of its licensed power, as long as required performance specifications are met and power does not exceed that which is allowed for the regular transmitter.

(c) The 5 day restriction on use of an FM or TV auxiliary transmitter without further authority of the Commission is deleted. (§§ 73.255(c)(2); 73.555(c)(2); 73.638(c)(2).)

(1) The corresponding rule applicable to AM stations does not include the 5 day restriction. No problems have arisen. Accordingly, we are conforming the FM and TV rules to the AM rule. This will eliminate a source of filings which we have found unnecessary in comparable situations.

(d) The provision for entry in the maintenance log of auxiliary transmitter tests is revised to reflect that such tests are no longer required but, if made voluntarily, must be entered. (§§ 73.114(a)(1)(ii); 73.284(a)(1); 73.584(a)(1); 73.672(a)(1).)

(1) The amendment is editorial to conform to new §§ 73.63(d); 73.255(d); 73.555(d); 73.638(d).

(e) Restriction on an FM auxiliary transmitter not exceeding the power rating or operating range of the main transmitter is deleted (§ 73.321), to conform to the new provision in § 73.255(f).

(f) Under the existing rules, a permittee or licensee can operate for a period of not more than 10 days without further authority of the Commission when, due to causes beyond his control, he cannot meet the requirements of our rules with respect to maintaining minimum operating power (§§ 73.52(a); 73.267(c); 73.567(c); 73.689(b)(3)) or minimum hours of operation (§§ 73.71(b); 73.261(b); 73.651(a)(3)), but must notify the Commission and the Engineer in Charge immediately. Those rules are revised to eliminate the present notification and to spell out the procedure for obtaining further authority of the Commission, e.g., a written request, no later than the 10th day, for such additional time as may be deemed necessary.

(1) Commission practice in handling such notifications has been to place them in a tickler file until expiration of the 10 day grace period, after which appropriate action is taken. In light of that procedure, the ultimate result will be unaltered if we permit the station to operate without the notification but request, on the last day of the grace period, permission for such additional time as may be deemed necessary. The Commission will be relieved of the man hours required for maintenance of such a file, and both the Commission and the licensees will be relieved of unnecessary paper work generated by problems remedied in less than 10 days.

(h) Clarification is made of the provisions in the AM and FM rules that an operator on duty must have ready access to and visibility of the transmitter, required monitors and other metering equipment—or the remote control instruments. The words "clearly visible" are deleted. They have been construed by some as limiting the instruments to a position directly in front of the operator. The rule is now written to provide that they must be readily accessible and so located that deviations from normal indications of the instruments can be observed within a 360° arc. (§§ 73.93(a); 73.265(a); 73.565(a).)

(1) Both the Commission's staff and licensees have experienced difficulty with this rule as it applies to AM and FM operations. A problem has been the interpretation given to the term "clearly visible." In the past, the Commission has held to a very narrow interpretation, and enforcement of the rule has produced unsatisfactory results. To remedy this situation, a more liberal interpretation was recently implemented. The substance of that interpretation is being incorporated into the revised language of the rule. (The nature of TV operation is such that no problems have arisen. The TV rule is not being changed.)

(i) Notifications to the FCC Engineer in Charge of the radio district in which the station is located are no longer required in the following cases:

defective modulation monitor (§§ 73.56(b)(2); 73.253(b)(2); 73.553(b)(2); 73.691(b)(2));
defective indicating instruments (§§ 73.58(b)(2); 73.258(b)(2); 73.558(b)(2); 73.688(f)(2));
defective frequency monitor (§§ 73.60(b)(2); 73.252(b)(2); 73.552(b)(2));
maintaining minimum operating schedule (§§ 73.71(b); 73.261(b); 73.651(a)(3));
maintaining minimum operating power (§§ 73.52(a); 73.267(c); 73.567(c); 73.689(b)(3));
departure from regular schedule of share-time operation (§ 73.77);
beginning of stereophonic broadcasting (§§ 73.297(a); 73.596(a));
transmission of point-to-point messages during emergency operation (§§ 73.98(f); 73.298(e); 73.597(e); 73.675(e)).

(1) In the above cases of defective equipment, notifications to the Engineer in Charge when the defect is found and when the equipment is restored to service are no longer necessary, and so serve no useful purpose. Other provisions of the rules limit operation without such equipment to 60 days without further authority from the Commission. The other notifications above are made also to the Commission, and duplicate notifications to the Engineer in Charge are unnecessary.

(j) Specifications concerning temperature variations at the crystals used in transmitters are deleted as unnecessary. (§ 73.40(a)(9)(i)(ii)(iii).)

(1) Subparagraph (a)(9) requires automatic frequency control equipment. With that requirement, it makes no dif-

ference whether the frequency is maintained by temperature control or other means. The means generally for maintaining frequency stability are best left to the industry and current technology.

(k) The requirement that an accurate circuit diagram, as furnished by the manufacturer of the equipment, be retained at the transmitter is eliminated. (§§ 73.317(e); 73.687(h).)

(1) Availability of such circuit diagram at the transmitter serves no Commission purpose.

(l) Equipment performance measurement data may be kept on file at the remote control point or at the transmitter. Additionally, the person signing the required material must also date it. (§§ 73.47(b); 73.254(c).)

(1) The Commission's interest is served if the data to be kept on file are readily available when a Commission engineer is conducting an inspection of the station. Including the remote control point as a permissible location at which to keep the data will not impede the inspection and will accommodate licensees, many of whom have requested this change. Measurement data should be dated in order to demonstrate compliance with the time periods specified elsewhere in these sections; and, accordingly, the pertinent paragraphs are corrected to conform them to the requirements of these sections. (§§ 73.47; 73.254.)

(m) The requirement that a licensee maintain a supply of spare tower lamps is eliminated. (§ 17.52.)

(1) The Commission's fundamental concern is that faulty tower lights be replaced as soon as practicable. This is clearly spelled out in § 17.56. We leave to the licensee's judgment the practice he will follow to comply with § 17.56.

(n) The requirement for an entry in the operating log of each interruption of the carrier wave, where restoration is not automatic, its cause and duration, followed by the signature of the person restoring operation, is eliminated. (§§ 73.113(a)(2); 73.283(a)(2); 73.583(a)(2); 73.671(a)(2).)

(1) The information serves no useful purpose. Strict compliance is unduly burdensome. Interruptions of significant duration are covered elsewhere in the rules.

(o) Signed copies of contracts with part-time, first class radiotelephone operators need no longer be filed with the Engineer in Charge of the radio district where the station is located (§§ 73.93(c); 73.265(c); 73.565(c).)

(1) The copies serve no purpose that cannot be satisfied by a Commission request to inspect the contract. The rule presently requires that such contracts be kept in the files of the station and made available for inspection upon request by an authorized representative of the Commission.

(p) The requirement for entry of transmission line meter readings in the operating logs of FM and TV stations is clarified

by making an exception when power is being determined by the indirect method (which is entered under another provision). (§§ 73.283(a)(3)(ii); 73.583(a)(3)(ii); 73.671(a)(3)(ii).)

(1) This is merely a clarification.

(q) The present rules require that one-hop aural STL's, aural intercity relays and TV STL's must be attended. Those rules are being revised to permit unattended operation, as the present rules provide for in the case of intermediate stations in multi-hop circuits in the aural services and in TV intercity relay stations, TV translator relay stations and multi-hop TV STL circuits. Observations at the receiving end of the circuit will still be required. (§§ 74.533(b); 74.635(a).)

(1) As presently drawn, the rules present something of an anomaly. They allow unattended operation of intermediate stations in multi-hop configurations in the aural services and for TV intercity relay stations, TV translator relay stations and multi-hop TV STL stations, but do not provide for unattended operation in certain single-hop situations. Faced with the anomaly, the Commission has found it appropriate in several instances to waive the requirement that transmitters in single-hop situations be attended. In certain other provisions of this section, specific language for corresponding aural and TV rules differ, but Commission policy and practice has been to give the language the same meaning. Revisions are being made therein to conform the aural and TV provisions and reflect existing Commission policy and practice in this matter.

6. Amendments hereby adopted remove requirements which, for the reasons stated above, we consider no longer necessary. They also make editorial revisions and conform language of certain rule provisions to established Commission policy and practice. We conclude that adoption of the amendments will serve the public interest. Therefore, prior notice of rule making and public procedure thereon are unnecessary, pursuant to the Administrative Procedure and Judicial Review provisions of 5 U.S.C. 553(b)(3)(B).

7. Therefore, IT IS ORDERED, That, pursuant to Sections 4(i) and 303(j), and (r) of the Communications Act of 1934, as amended, Parts 17, 73 and 74 of the Commission's Rules and Regulations are amended as set forth in the attached Appendix, effective April 4, 1973.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

§ 17.52 [Deleted]

1. Section 17.52, Spare Lamps, is deleted and that section number is designated as [Reserved].

2. Section 73.40(a)(9) is amended by deleting paragraphs (i), (ii), (iii), thereunder, and, as amended, reads as follows:

§ 73.40 Transmitter; design, construction, and safety of life requirements.

(a) * * *

* * * * * * *

(9) The transmitter is equipped with automatic frequency control equipment capable of maintaining the operating frequency within the limit specified by § 73.59.

(10) * * *

* * * * * * *

3. Section 73.47(b) is amended to read as follows:

§ 73.47 Equipment performance measurements.

* * * * * * *

(b) The data required by paragraph (a) of this section, together with a description of instruments and procedure, signed and dated by the qualified person making the measurements, shall be kept on file at the transmitter or remote control point for a period of two years, and on request shall be made available during that time to any duly authorized representative of the Federal Communications Commission.

4. Section 73.52(a) is amended to read as follows:

§ 73.52 Antenna input power; maintenance of.

(a) The actual antenna input power of each station shall be maintained as near as is practicable to the authorized antenna input power and shall not be less than 90 percent nor greater than 105 percent of the authorized power; except that, if, in an emergency, it becomes technically impossible to operate with the authorized power, the station may be operated with reduced power for a period of 10 days or less, without further authority from the Commission. If causes beyond the control of the permittee or licensee prevent restoration of authorized power within the allowed period, informal written request shall be made to the Commission in Washington, D.C., no later than the 10th day for such additional time as may be deemed necessary.

* * * * * * *

5. Section 73.56(b) is amended by deleting paragraph (2) and re-numbering paragraph (3) as paragraph (2). As amended, § 73.56(b) reads as follows:

§ 73.56 Modulation monitors.

* * * * * * *

(b) In the event that the modulation monitor becomes defective, the station may be operated without the monitor pending its repair or replacement for a period not in excess of 60 days without further authority of the Commission: Provided, That:

(1) Appropriate entries shall be made in the maintenance log of the station showing the date and time the monitor was removed and restored to service.

(2) The degree of modulation of the station shall be monitored with a cathode ray oscilloscope or other acceptable means.

* * * * * * *

6. Section 73.58(b)(2) is amended by deleting the requirement for notification to the Engineer in Charge and reserving the paragraph number. As amended, § 73.58(b)(2) reads as follows:

§ 73.58 Indicating instruments.

* * * * * * *

(b) * * *

2. [Reserved]

* * * * * * *

7. Section 73.60(b)(2) is amended by deleting the requirement for notification to the Engineer in Charge and reserving the paragraph number. As amended, § 73.60(b)(2) reads as follows:

§ 73.60 Frequency monitor.

* * * * * * *

(b) * * *
2. [Reserved]

* * * * * * *

8. Section 73.63 is amended by revising paragraph (d) and (g) to read as follows:

§ 73.63 Auxiliary transmitter.

* * * * * * *

(d) The auxiliary transmitter may be used only if it is in proper operating condition and adjusted to the licensed frequency. If testing is necessary to assure proper operation, it may be done any time. A dummy load or any authorized antenna may be used. Notations as to the time and results of such testing must be made in the maintenance log.

* * * * * * *

(g) The authorized antenna input power of an auxiliary transmitter may be less, but not more, than that of the regular transmitter. If it is less, the actual operating power is not limited to 105% of the authorized antenna input power of the auxiliary transmitter but shall in no event exceed the authorized antenna input power of the regular transmitter.

* * * * * * *

9. Section 73.71(b) is amended to read as follows:

OPERATION

§ 73.71 Minimum operation schedule.

* * * * * * *

(b) In the event that causes beyond the control of a permittee or licensee make it impossible to adhere to the operating schedule in paragraph (a) of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 10 days, without further authority of the Commission. If causes beyond the control of the permittee or licensee make it impossible to comply within the allowed period, informal written request shall be made to the Commission in Washington, D.C., no later than the 10th day for such additional time as may be deemed necessary.

* * * * * * *

10. Section 73.77 is amended to read as follows:

§ 73.77 Sharing time; departure from regular schedule.

A departure from the regular schedule set forth in a time-sharing agreement will be permitted only in cases where an agreement to that effect is reduced to writing, is signed by the licensees of the stations affected thereby and filed in triplicate by each licensee with the Commission prior to the time of the proposed change. If time is of the essence, the actual departure in operating schedule may precede the actual filing of written agreement, provided appropriate notice is sent to the Commission in Washington, D.C.

11. In § 73.93, paragraphs (a) & (c) are amended to read as follows:

§ 73.93 Operator requirements.

(a) One or more operators holding a radio operator license or permit of a grade specified in this section shall be in actual charge of the transmitting system, and shall be on duty either at the transmitter location or at the remote control point. If operation by remote control has not been authorized, the transmitter, required monitors and other required metering equipment shall be readily

accessible, and located sufficiently close to the operator at the normal operating position that deviations from normal indications of required instruments can be observed within a 360° arc from that position. If operation by remote control is authorized, the required controls and instruments shall be readily accessible, and located sufficiently close to the operator at the normal operating position that deviations from normal indications of required metering instruments can be observed in a 360° arc from that position.

* * * * * * *

(c) A station using a non-directional antenna and with authorized power of 10 kilowatts or less shall have at least one first class radio-telephone operator, readily available at all times, either in full-time employment, or, in the alternative, the licensee may contract in writing for the services on a part-time basis of one or more such operators. Signed contracts with part-time operators shall be kept in the files of the station and shall be made available for inspection upon request by an authorized representative of the Commission.

* * * * * * *

12. Section 73.98(f) is amended to read as follows:

§ 73.98 Operation during emergency.

* * * * * * *

(f) Immediately upon cessation of an emergency during which broadcast facilities were used for the transmission of point-to-point messages under paragraph (a) of this section, or when daytime facilities were used during nighttime hours in accordance with paragraph (d) of this section, a report in letter form shall be forwarded to the Commission, in Washington, D.C., setting forth the nature of the emergency, the dates and hours of emergency operation, and a brief description of the material carried during the emergency period. A certification of compliance with the noncommercialization provision of paragraph (d) of this section must accompany the report where daytime facilities are used during nighttime hours, together with a detailed showing concerning the alternate service provisions of that paragraph.

* * * * * * *

13. Section 73.113(a)(2) is amended by deleting the provisions therein and reserving the paragraph number. As amended, § 73.113(a)(2) reads as follows:

§ 73.113 Operating log.

(a) * * *
(2) [Reserved]

* * * * * * *

14. Section 73.114(a)(1)(ii) is amended to read as follows:

§ 73.114 Maintenance log.

(a) * * *
(1) * * *
(ii) Time and result of any auxiliary transmitter test(s).

* * * * * * *

15. Section 73.252(b)(2) is amended by deleting the requirement for notification to the Engineer in Charge and reserving the paragraph number. As amended, § 73.252(b)(2) reads as follows:

§ 73.252 Frequency monitor.

* * * * * * *

109-022--73----7

(b) * * *
(2) [Reserved]

* * * * * * *

16. Section 73.253(b) is amended by deleting paragraph (2) and renumbering paragraph (3) as paragraph (2). As amended, § 73.253(b) reads as follows:

§ 73.253 Modulation monitors.

* * * * * * *

(b) In the event that the modulation monitor becomes defective, the station may be operated without the monitor pending its repair or replacement for a period not in excess of 60 days without further authority of the Commission: *Provided,* That:

(1) Appropriate entries shall be made in the maintenance log of the station showing the date and time the monitor was removed and restored to service.

(2) During the period when the station is operated without the modulation monitor, the licensee shall provide other suitable means for insuring that the modulation is maintained within the tolerance prescribed in § 73.268.

* * * * * * *

17. Section 73.254(c) is amended to read as follows:

§ 73.254 Required transmitter performance.

* * * * * * *

(c) The data required by paragraph (b) of this section, together with a description of instruments and procedure, signed and dated by the qualified person making the measurements, shall be kept on file at the transmitter or remote control point for a period of two years, and on request shall be made available during that time to any duly authorized representative of the Federal Communications Commission.

18. Section 73.255(c)(2), (d) and (f) are amended to read as follows:

§ 73.255 Auxiliary transmitter.

* * * * * * *

(c) * * *

(2) The transmission of regular programs during maintenance or modification work on the main transmitter, necessitating discontinuance of its operation.

* * * * * * *

(d) The auxiliary transmitter may be used only if it is in proper operating condition and adjusted to the licensed frequency. If testing is necessary to assure proper operation, it may be done any time. A dummy load or any authorized antenna may be used. Notations as to the time and results of such testing must be made in the maintenance log.

* * * * * * *

(f) The authorized operating power of an auxiliary transmitter may be less but not more than that of the regular transmitter. If it is less, the actual operating power is not limited to 105% of the authorized operating power of the auxiliary transmitter, but shall in no event exceed the authorized operating power of the regular transmitter.

19. Section 73.258(b)(2) is amended by deleting the requirement for notification to the Engineer in Charge and reserving the paragraph number. As amended, § 73.258(b)(2) reads as follows:

§ 73.258 Indicating instruments.

* * * * * * *

(b) * * *
(2) [Reserved]

* * * * * * *

20. Section 73.261(b) is amended to read as follows:

TECHNICAL OPERATIONS AND OPERATORS

§ 73.261 Time of operation.

* * * * * * *

(b) In the event that causes beyond the control of a permittee or licensee make it impossible to adhere to the operating schedule in paragraph (a) of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 10 days, without further authority of the Commission. If causes beyond the control of the permittee or licensee make it impossible to comply within the allowed period, informal written request shall be made to the Commission in Washington, D.C. no later than the 10th day for such additional time as may be deemed necessary.

* * * * * * *

21. In § 73.265, paragraphs (a) & (c) are amended to read as follows:

§ 73.265 Operator requirements.

(a) One or more operators holding a radio operator license or permit of a grade specified in this section shall be in actual charge of the transmitting system, and shall be on duty either at the transmitter location or at the remote control point. If operation by remote control has not been authorized, the transmitter, required monitors and other required metering equipment shall be readily accessible, and located sufficiently close to the operator at the normal operating position that deviations from normal indications of required instruments can be observed within a 360° arc from that position. If operation by remote control is authorized, the required controls and instruments shall be readily accessible, and located sufficiently close to the operator at the normal operating position that deviations from normal indications of required metering instruments can be observed in a 360° arc from that position.

* * * * * * *

(c) A station with authorized transmitter output power of 25 kilowatts or less shall have at least one first class radiotelephone operator readily available at all times, either in full-time employment, or, in the alternative, the licensee may contract in writing for the services on a part-time basis of one or more such operators. Signed contracts with part-time operators shall be kept in the files of the station and shall be made available for inspection upon request by an authorized representative of the Commission.

* * * * * * *

22. Section 73.267(c) is amended to read as follows:

§ 73.267 Operating power; determination and maintenance of.

* * * * * * *

(c) *Reduced power.* In the event it becomes technically impossible to operate with authorized power, the station may be operated with reduced power for a period of 10 days or less without further authority of the Commission. If causes beyond the control of the permittee or licensee prevent restoration of authorized power within the allowed period, informal written request shall be made to the Commission in Washington, D.C. no later than the 10th day for such additional time as may be deemed necessary.

* * * * * * *

23. In § 73.283(a), subparagraph (2) is deleted and designated [Reserved], and paragraph (a)(3)(ii) is amended as follows:

§ 73.283 Operating log.

(a) * * *
(2) [Reserved]
(3) * * *
(ii) RF transmission line meter reading, except when power is being determined by the indirect method.

* * * * * * *

24. Section 73.284(a)(1) is amended to read as follows:

§ 73.284 Maintenance log.

(a) * * *

(1) ime and result of any auxiliary transmitter test(s).

* * * * * * *

25. Section 73.297(a) is amended to read as follows:

§ 73.297 Stereophonic broadcasting.

(a) FM broadcast stations may, without further authority, transmit stereophonic programs in accordance with the technical standards set forth in § 73.322: *Provided, However,* That the Commission in Washington, D.C. shall be notified within 10 days of the installation of type-accepted stereophonic transmission equipment or any change therein, and of the commencement of stereophonic programming.

* * * * * * *

26. Section 73.298(e) is amended to read as follows:

§ 73.298 Operation during emergency.

* * * * * * *

(e) Immediately upon cessation of an emergency during which broadcast facilities were used for the transmission of point-to-point messages under paragraph (a) of this section, a report in letter form shall be forwarded to the Commission in Washington, D.C., setting forth the nature of the emergency, the dates and hours of emergency operation, and a brief description of the material carried during the emergency period.

* * * * * * *

27. Section 73.317(e) is amended by deleting the provisions therein and reserving the paragraph number. § 73.317(e), as amended, reads as follows:

§ 73.317 Transmitters and associated equipment.

* * * * * * *

(e) [Reserved]

* * * * * * *

28. Section 73.321 is amended to read as follows:

§ 73.321 Auxiliary transmitters.

Auxiliary transmitters must conform to the performance characteristics specified by § 73.317, except with respect to the provisions of paragraphs (a)(2) through (a)(5) thereof.

29. Section 73.552(b)(2) is amended by deleting the requirement for notification to the Engineer in Charge and reserving the paragraph number. As amended, § 73.552(b)(2) reads as follows:

§ 73.552 Frequency monitor.

* * * * * * *

(b) * * *
(2) [Reserved]

* * * * * * *

30. Section 73.553(b) is amended by deleting paragraph (2) and renumbering paragraph (3) as paragraph (2). As amended, § 73.553(b) reads as follows:

§ 73.553 Modulation monitors.

* * * * * * *

(b) In the event that the modulation monitor becomes defective, the station may be operated without the monitor pending its repair or replacement for a period not in excess of 60 days without further authority of the Commission: *Provided*, That:

(1) Appropriate entries shall be made in the maintenance log of the station showing the date and time the monitor was removed and restored to service.

(2) During the period when the station is operated without the modulation monitor, the licensee shall provide other suitable means for insuring that the modulation is maintained within the tolerance prescribed in § 73.568.

* * * * * * *

31. Section 73.555(c)(2), (d) and (f) are amended to read as follows:

§ 73.555 Auxiliary transmitter.

* * * * * * *

(c) * * *

(2) The transmission of regular programs during maintenance or modification work on the main transmitter, necessitating discontinuance of its operation.

* * * * * * *

(d) The auxiliary transmitter may be used only if it is in proper operating condition and adjusted to the licensed frequency. If testing is necessary to assure proper operation, it may be done any time. A dummy load or any authorized antenna may be used. Notations as to the time and results of such testing must be made in the maintenance log.

* * * * * * *

(f) The licensed power of an auxiliary transmitter may be less, but not more, than that of the regular transmitter. If it is less, the operating power is not limited to 105% of its licensed power but shall in no event exceed 105% of the licensed power of the regular transmitter.

32. Section 73.558(b)(2) is amended by deleting the requirement for notification to the Engineer in Charge and reserving the paragraph number. As amended, § 73.558(b)(2) reads as follows:

§ 73.558 Indicating instruments.

* * * * * * *

(b) * * *
(2) [Reserved]

* * * * * * *

33. In § 73.565, paragraphs (a) & (c) are amended to read as follows:

§ 73.565 Operator requirements.

(a) One or more operators holding a radio operator license or permit of a grade specified in this section shall be in actual charge of the transmitting system, and shall be on duty either at the transmitter location or at the remote control point. If operation by remote control has not been authorized, the transmitter, required monitors and other required metering equipment shall be read-

ily accessible, and located sufficiently close to the operator at the normal operating position that deviations from normal indications of required instruments can be observed within a 360° arc from that position. If operation by remote control is authorized, the required controls and instruments shall be readily accessible, and located sufficiently close to the operator at the normal operating position that deviations from normal indications of required metering instruments can be observed in a 360° arc from that position.

* * * * * * *

(c) The operators specified in paragraph (b) of this section shall perform transmitter maintenance and shall correct conditions of improper operation beyond the scope of authority of the lesser grade operator on duty. If the services of the operator or the operators indicated in paragraph (b) are on a contract, part-time basis, a signed copy of the contract shall be kept in the files of the station and shall be made available for inspection upon request by an authorized representative of the Commission.

* * * * * * *

34. Section 73.567(c) is amended to read as follows:

§ 73.567 Operating power; determination and maintenance of.

* * * * * * *

(c) Reduced power. If a station licensed for transmitter power output greater than 10 watts finds it impossible to operate with authorized power, the station may operate with reduced power for a period not to exceed 10 days. If causes beyond the control of the permittee or licensee prevent restoration of authorized power within the allowed period, informal written request shall be made to the Commission in Washington, D.C. no later than the 10th day for such additional time as may be deemed necessary.

* * * * * * *

35. In § 73.583, paragraph (a)(2) is deleted and designated [Reserved], and subparagraph (3)(ii) is amended to read as follows:

§ 73.583 Operating log.

(a) * * *
(2) [Reserved]
(3) * * *
(ii) RF transmission line meter reading, except when power is being determined by the indirect method.

* * * * * * *

36. Section 73.584(a)(1) is amended to read as follows:

§ 73.584 Maintenance log.

(a) * * *
(1) Time and result of any auxiliary transmitter test(s).

* * * * * * *

37. Section 73.596(a) is amended to read as follows:

§ 73.596 Stereophonic broadcasting.

(a) Noncommercial educational FM broadcast stations may, without further authority, transmit stereophonic programs in accordance with the technical standards set forth in § 73.322: *Provided, however,* That the Commission, in Washington, D.C., shall be notified within 10 days, of the installation of type-accepted stereophonic transmission equipment or any change therein, and of the commencement of stereophonic programming.

* * * * * * *

38. Section 73.597(e) is amended to read as follows:

§ 73.597 Operation during emergency.

* * * * * * *

(e) Immediately upon cessation of an emergency during which broadcast facilities were used for the transmission of point-to-point messages under paragraph (a) of this section, a report in letter form shall be forwarded to the Commission in Washington, D.C., setting forth the nature of the emergency, the dates and hours of emergency operation, and a brief description of the material carried during the emergency period.

* * * * * * *

39. Section 73.638(c)(2) and (d) are amended to read as follows:

§ 73.638 Auxiliary transmitter.

* * * * * * *

(c) * * *

(2) The transmission of regular programs during maintenance or modification work on the main transmitters, necessitating discontinuance of their operation.

* * * * * * *

(d) The auxiliary transmitter may be used only if it is in proper operating condition and adjusted to the licensed frequency. If testing is necessary to assure proper operation, it may be done any time. A dummy load or any authorized antenna may be used. Notations as to the time and results of such testing must be made in the maintenance log.

* * * * * * *

40. Section 73.651(a)(3) is amended to read as follows:

General Operating Requirements

§ 73.651 Time of operation.

* * * * * * *

(a) * * *

(3) In the event that causes beyond the control of a permittee or licensee make it impossible to adhere to the operating schedule in paragraph (a) of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 10 days, without further authority of the Commission. If causes beyond the control of the permittee or licensee make it impossible to comply within the allowed period, informal written request shall be made to the Commission in Washington, D.C. no later than the 10th day for such additional time as may be deemed necessary.

* * * * * * *

41. In § 73.671, paragraph (a)(2) is deleted and designated [Reserved], and paragraph (a)(3)(ii) is amended to read as follows:

§ 73.671 Operating log.

(a) * * *

(2) [Reserved]

(3) * * *

(ii) Transmission line meter readings for both transmitter. If power of the aural transmitter is being determined by the indirect method, enter the transmission line meter reading for the visual transmitter only.

* * * * * * *

42. Section 73.672(a)(1) is amended to read as follows:

§ 73.672 Maintenance log.

(a) * * *
(1) Time and result of any auxiliary transmitter test(s).

* * * * * * *

43. Section 73.675(e) is amended to read as follows:

§ 73.675 Operation during emergency.

* * * * * * *

(e) Immediately upon cessation of an emergency during which broadcast facilities were used for the transmission of point-to-point messages under paragraph (a) of this section, a report in letter form shall be forwarded to the Commission in Washington, D.C., setting forth the nature of the emergency, the dates and hours of emergency operation, and a brief description of the material carried during the emergency period.

* * * * * * *

44. Section 73.687(h) is amended by deleting the provisions therein and reserving the paragraph number. § 73.687(h), as amended, reads as follows.

§ 73.687 Transmitters and associated equipment.

* * * * * * *

(h) [Reserved]

45. Section 73.688(f)(2) is amended by deleting the requirement for notification to the Engineer in Charge and reserving the paragraph number. As amended, § 73.688(f)(2) reads as follows:

§ 73.688 Indicating instruments.

* * * * * * *

(f) * * *
(2) [Reserved]

* * * * * * *

46. Section 73.689(b)(3) is amended to read as follows:

§ 73.689 Operating power.

* * * * * * *

(b) * * *
(3) *Reduced power.* In the event it becomes technically impossible to operate with the authorized power, the station may be operated with reduced power for a period of 10 days or less without further authority of the Commission. If causes beyond the control of the permittee or licensee prevent restoration of authorized power within the allowed period, informal written request shall be made to the Commission in Washington, D.C., no later than the 10th day for such additional time as may be deemed necessary.

* * * * * * *

47. Section 73.691(b) is amended by deleting paragraph (2) and re-numbering paragraph (3) as paragraph (2), and paragraph (4) as paragraph (3). As amended, § 73.691(b) reads as follows:

§ 73.691 Modulation monitors.

* * * * * * *

(b) In the event the visual monitoring equipment or the aural modulation monitor becomes defective, the station may be operated without such equipment pending its repair or replacement for a period not in excess of 60 days without further authority of the Commission: *Provided*, That:

(1) Appropriate entries shall be made in the maintenance log of the station to show the date and time the equipment was removed from and restored to service.

(2) During the period when the station is operated without the aural modulation monitor or the visual monitoring equipment, the licensee shall provide other suitable means for insuring that the aural modulation is maintained within the tolerance prescribed in § 73.687(b)(7) and that the visual signal is maintained in accordance with the requirements of this subpart.

(3) If conditions beyond the control of the licensee or permittee prevent the restoration of the monitor or monitoring equipment to service within the period specified above, an informal request in accordance with § 1.549 of this chapter may be filed with the Engineer in Charge of the radio district in which the station is located for such additional time as may be required to complete repairs of the defective instrument or equipment.

48. Section 74.533(b), (b)(1) and (b)(4) are amended to read as follows:

§ 74.533 Remote control and unattended operation.

* * * * * * *

(b) Aural broadcast STL and intercity relay stations may be operated unattended: *Provided*, That such operation is conducted in accordance with the conditions listed below: *And provided further*, That the Commission in Washington, D.C., is notified at least 10 days prior to the beginning of such operation and that such notification is accompanied by a detailed description showing the manner of compliance with the following conditions:

(1) In the case where the station retransmits another station's signals received directly "off-the-air", the transmitter shall be equipped with automatic circuits that will cause it to cease radiating at times when no signal is being received from the station which it is relaying.

* * * * * * *

(4) Whenever an unattended aural broadcast STL or intercity relay station is in operation, appropriate observations shall be made at the receiving end of the circuit at intervals not exceeding one hour by a person designated by and under the control of the licensee and need not be a licensed operator under Part 13 (Commercial Radio Operators) of our rules.

* * * * * * *

49. Section 74.635(a) and (a)(1) are amended to read as follows:

§ 74.635 Unattended operation.

(a) Television intercity relay stations, television translator relay stations, and television STL stations may be operated unattended: *Provided*, That such operation is conducted in accordance with the conditions listed below: *And provided further*, That the Commission, in Washington, D.C., is notified at least 10 days prior to the beginning of such operation and that such notification is accompanied by a detailed description showing the manner of compliance with the following conditions:

(1) In the case where the station retransmits another station's signals received directly "off-the-air", the transmitter shall be equipped with automatic circuits that will cause it to cease radiating at times when no signal is being received from the station which it is relaying.

* * * * * * *

SEPARATE STATEMENT OF COMMISSIONER RICHARD E. WILEY

This Order represents the Commission's second action in a continuing program to "re-regulate" the broadcast industry and, in particular, radio. Like our first Order, issued several months ago, this action amends and, in some cases, deletes certain so-called technical or record-keeping requirements—and, again like our first Order, essentially involves rule changes which, at least in their individual application, may appear to be relatively minor. As such, both Orders are subject to the possible criticism of being insignificant and unsubstantial—"a few crumbs" as one dissatisfied observer has put it.

In my opinion, such a criticism is not only inaccurate (particularly when applied to smaller stations) but, more importantly, overlooks several salient facts concerning the Orders in question and, indeed, our entire re-regulatory program. As Chairman Burch made clear in announcing the Commission's initial re-regulatory action, these Orders are but the beginning steps in what will be a journey of several years duration toward the ultimate objective of a better, more intelligent regulation of broadcasting. Furthermore, such Orders have involved direct amendments of Commission rules made without the benefit of comment from the industry and the public. Accordingly, the amendments necessarily represent non-controversial changes in existing Commission regulations which we have concluded are in the public interest.

Finally, it seems to me that those who lightly dismiss our efforts to date overlook the profound significance of the re-regulatory program—a program in which a branch of the federal government, on its own initiative, has indicated a willingness to take a hard look at itself, to redetermine its regulatory objectives and to evaluate, carefully and exhaustively, whether its current rules and policies will effectuate those objectives in the best and most appropriate manner. As such, at least to my way of thinking, the Commission's re-regulatory venture represents the very essence of good government. Moreover, it is a project in which the government has invited, indeed encouraged, the industry affected (as well as the public at large) to contribute to the betterment of its own regulation. The by-products of such a program, one in which government and industry discard their mutual isolation to work together toward a common goal directed eventually to better service to the American public, have a potential importance far beyond technical rule modifications. For what may be involved, in the final analysis, is the creation of a whole new mood of regulation.

While additional Orders making still more direct rule changes remain a possibility, Phase I of our project has been essentially completed. The Commission's Public Notice, which accompanies our Orders, sets forth at least some of the areas to which—in Phase II—we will now direct our attention and to which we again will invite and encourage the contributions—formal and informal—of all interested persons.

In closing, I should reiterate and again make clear that what is involved here is a long-range program—and, while we will move along our projected pathway as expeditiously as prudent administrative conduct makes possible, we will not be stampeded by the impatience of special interests nor impelled by an inordinate desire on our own part to reap immediate and perhaps short-sighted benefits. For, as I see it, a hasty, incomplete and imprudent consideration of the complex and important issues involved would benefit neither our pronounced goal, the licensees we regulate nor, ultimately, the public we serve.

F.C.C. 72-1170

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
TAFT BROADCASTING COMPANY	
For Renewal of Licenses for	
STATION WTVN, COLUMBUS, OHIO	File No. BR-289
STATION WTVN-TV, COLUMBUS, OHIO	File No. BRCT-38
STATION WBUK(FM),* COLUMBUS, OHIO	File No. BRH-1009

MEMORANDUM OPINION AND ORDER

(Adopted December 20, 1972; Released January 3, 1973)

BY THE COMMISSION: COMMISSIONER HOOKS DISSENTING.

1. The Commission has before it for consideration: (i) the above-captioned applications for renewal of license for stations WTVN, WTVN-TV and WBUK(FM), Columbus, Ohio, filed on July 6, 1970, by Taft Broadcasting Company (hereinafter referred to as "Taft" or "licensee"); (ii) a petition to deny the above-captioned applications filed on August 31, 1970, by the Columbus Broadcasting Coalition (hereinafter referred to as the "Coalition" or "petitioners"); (iii) an opposition to the petition to deny filed by Taft on October 14, 1971; (iv) a reply to the opposition filed by the Coalition on January 18, 1971; (v) a response by Taft to petitioners' reply pleading filed on May 14, 1971; and (vi) a reply to Taft's response to petitioners' reply filed on November 19, 1971.

STANDING

2. The Coalition consists of individuals and nonprofit community organizations. The Coalition states that most of the individual petitioners are black, that all of them reside within the area of license, and that they are regular listeners and viewers of Taft Columbus stations. As to the community groups, it is averred that they are concerned with a wide range of community problems, particularly those faced by blacks. The Commission finds, therefore, that the petitioners have standing as parties in interest within the meaning of Section 309(d)(1) of the Communications Act of 1934, as amended (47 U.S.C. 309(d)(1)), and Section 1.580(i) of the Commission's rules (47 C.F.R. 1.580(i)). *Office of Communication of the United Church of Christ* v. *Federal Communications Commission*, 359 F. 2d 994 (1966).

*Subsequent to the filing of the pleadings in this proceeding, the call letters of WBUK were changed to WTVN-FM, effective November 16, 1972.

PRELIMINARY STATEMENT

3. Briefly, the Coalition alleges that Taft (a) has failed to adequately ascertain the needs and interests of the black community in Columbus, (b) has not during the past license period presented sufficient programming to meet black needs and interests, (c) has discriminated against blacks in its employment practices, (d) has presented advertising that is "overtly racist," and (e) exercises undue concentration of control of the mass media in Ohio. Petitioners contend that their allegations raise substantial and material questions of fact as to whether renewal of the broadcast licenses of WTVN, WTVN–TV, and WBUK would serve the public interest, convenience, and necessity as required by the Communications Act of 1934, as amended. Accordingly, the Coalition requests that the Commission designate the above-captioned applications for hearing.

4. Prior to discussing the substance of the pleadings before us, a threshold procedural matter must be considered. Section 1.45 of the Commission's rules (47 C.F.R. 1.45) provides for the filing of a petition to deny, an opposition and a reply. The purpose of a reply is to respond to points made in the opposition to the petition to deny; accordingly, new matters are not properly raised in the reply. Additional pleadings may be filed only if specifically requested or authorized by the Commission. As mentioned above (par. 1), a response to petitioners' reply was filed, wherein Taft alleges that petitioners improperly raised new matter in the reply. It is argued that this new matter should be stricken or, in the alternative, that Taft's response be authorized by the Commission. Thereafter, petitioners filed a reply to Taft's response, contending that no new matters had been raised in the reply to the opposition; that new matters had been raised in Taft's response; and that either the entire response should be stricken or, in the alternative, all new matters in the response should be stricken.

5. Under similar circumstances, we have stated that we do not condone either the use of any pleading for other than the designated purpose, or the submission of additional pleadings which would thwart the orderly administration of the Commission's processes. *Scripps-Howard Broadcasting Co.*, 26 FCC 2d 824, 825 (1970). In this regard, we note that the public interest encompasses both procedural and substantive elements. By allowing any new matter and additional pleadings, we would serve notice that our rules can be effectively ignored. Nevertheless, we recognize that the substantive issues raised by the pleadings bear on the public interest and that, notwithstanding their respective motions to strike, each of the parties has responded to the allegations made by the other. We find, therefore, that the rights of the parties have been protected. In addition, under the circumstances presented by this case (*i.e.*, our consideration of the instant pleadings comes more than two years after the expiration date of the last license term), we conclude that the orderly administration of the Commission's processes has not been thwarted. Accordingly, we will consider all the pleadings submitted by the parties. We wish to emphasize, how-

ever, that the Commission does not condone the violation of our procedural rules and that in the absence of extenuating circumstances we will not consider such pleadings in the future.

6. We will discuss each of the issues separately, setting out the allegations presented by the parties and our conclusions. We do not purport to set forth fully every detail of all the pleadings. We believe, however, that the facts stated adequately describe the substance of the pleadings and provide sufficient bases for our conclusions. *Scripps-Howard Broadcasting Company*, 31 FCC 2d 1090, 1100 (1971). Also, since most of the issues raised by the petitioners apply to all the stations, we generally discuss the allegations without reference to a specific station. Where, however, the allegations are directed to only one or two of the stations, we will, of course, refer to the particular station or stations involved.

7. Section 309(d)(2) of the Communications Act (47 U.S.C. 309(d)(2)) provides that a renewal application may be granted where the Commission finds, after full consideration of all pleadings submitted, that there "are no substantial and material questions of fact and that a grant of the application would be consistent with [the public interest]." Where a petition to deny has been filed, specific allegations of fact must be made which show that a grant of the application would be *prima facie* inconsistent with the public interest. Should the petition contain such allegations, designation of the renewal application is warranted. The question before us here, then, is whether we should hold a hearing on any one or more of the above-captioned applications.

ASCERTAINMENT OF COMMUNITY PROBLEMS

8. Initially, petitioners allege that Taft failed to adequately ascertain the needs and interests of the black community within the licensee's service area. The Coalition states that only 6% of the 150 community leaders interviewed by the licensee are black while 25% of the population is black, and that those consulted represent "only one philosophical element . . . within the very diverse spectrum of thinking within the black community." Hence, petitioners contend that Taft did not interview any members of the more active or "militant" black groups in the community (*e.g.*, Afro-Am, the Afro-Set, the Committee, or the Black Panthers). Moreover, petitioners allege that Taft has misled the Commission by including in its list of interviewees the name of Mr. James T. Robinson, Jr. In a sworn affidavit Mr. Robinson states that Taft management personnel never conducted an ascertainment interview with him; that he never visited either the offices or the studios of the licensee; that no management personnel ever visited his office, nor did he meet with such personnel elsewhere; and that he objects to the use of his name in the Taft renewal application. Finally, the Coalition condemns a series of Taft-initiated luncheon consultations with blacks because the meetings were held "only a few months prior to license renewal time." Petitioners contend that since the meetings were not conducted often and continuously throughout the three-year

license period, a question is raised as to whether Taft's ascertainment efforts were made in good faith.

9. In opposition Taft states that 131 community leaders were consulted in connection with the ascertainment survey, and that of those 131, 26 are black. Hence, the licensee argues that 20%, not 6%, of the leaders consulted are black. As to the minority population within the service area, it is stated that the black population in the WTVN nighttime interference-free service area is no more than 12.2%; that the nonwhite population in Franklin County (where Columbus is located) is 11.9%; in the "Metro Area," 11.1%; in the Grade A coverage area of WTVN–TV, 10%; and within the 2 mv/m daytime contour of WTVN, 7.0%. To refute the allegation that the black leaders consulted represent "only one philosophical element" of the black community, it is stated that the black people contacted by Taft include a high school student, educators, civil rights group representatives, city officials, the manager of a Columbus black newspaper, religious leaders, an attorney, and a State Senator; that at least five of the black persons contacted are members of groups signing the petition to deny; and that three of the 11 individual signers of the petition to deny were included.

10. As to the allegation that Mr. Robinson's name was improperly included in the list of community leaders, Taft encloses an affidavit signed by Mr. Alan E. Collier, Station Manager of WBUK(FM) (Opposition, Attachment 116). Mr. Collier states that he telephoned Mr. Robinson on May 28, 1970, in order to elicit his views on the problems facing Columbus. To explain the apparent conflict between the Collier and Robinson affidavits, the licensee observes that (1) Mr. Robinson may not have known that WBUK(FM) (which had changed its call letters from WTVN–FM in 1968) is a Taft station; (2) Mr. Robinson may not have realized that Mr. Collier, who was relatively new to the community, is a Taft station manager; and (3) Mr. Robinson's affidavit is narrowly worded so as to be consistent with the fact that he was contacted by Mr. Collier by telephone.

11. Taft also disputes petitioners' characterization of its efforts to ascertain community needs during the last license period, stating that continuing ascertainment of community needs and interests is a regular and ongoing part of the operation of the stations. In support, Taft offers copies of sample ascertainment reports from the stations' files (Opposition, Attachments 94–100). These reports were submitted by the licensee's personnel pursuant to consultations with individuals in the community. These consultations, it is stated, were instrumental in the initiation of the following:

a. The "Like it Is" series of WTVN weekly local public affairs programs devoted entirely to topics of interest to the black community;

b. Taft's production of public service announcements broadcast by WTVN and WTVN–TV urging Columbus area residents to complete their census questionnaires;

c. Programming presented by WTVN and WTVN–TV concerning the Negro Economy Savings Plan, a new black business in

Columbus, Model Cities, the development of a black bank, an art program for underprivileged children, and the role of blacks in politics;

d. Expansion of the "inner city newsbeat of WTVN–TV";

e. The hiring of a black newsman to work for WTVN.

Additional ascertainment reports describe (1) assistance given by a WTVN–TV employee to a local black youth group, (2) a meeting between the manager and other employees of WTVN–TV with a newly elected black Columbus City councilman, (3) "a meeting held for the purpose of discussing ways to establish improved communications with leaders of the Black community," and (4) a meeting with persons interested in the Columbus Model Cities Project.

12. Finally, the licensee notes that in February 1970, it decided to establish "a regular series of monthly meetings with Black community leaders." By the expiration date of the stations' licenses (October 1, 1970) seven meetings had been held, with twenty-seven (27) black leaders having attended one or more of the meetings. (Three of these leaders, Mr. Ray Ball, Mr. James T. Robinson, Jr., and Mr. Robert A. Wade, signed the petition to deny.) Finally, five other meetings with black leaders—including three with The Committee—were held between March 24 and May 28, 1970.

13. In reply, petitioners state that Taft has failed to refute the claim that the black community has been systematically underrepresented in all aspects of the ascertainment survey process. Petitioners argue that the methods used by the licensee "assur[ed] that significant segments of the Black community [would] be totally excluded." For instance, it is stated that Taft disregarded many unemployed black men and women who, although on welfare or collecting unemployment, are leaders of community groups which are active in welfare, housing, medical, educational, and occupational programs. Further, petitioners allege that Taft, in choosing at random area residents who would receive ascertainment questionnaires, consulted the Columbus telephone directory, thereby excluding many blacks who either do not have telephones or who are not listed in the directory. Petitioners assert that Taft has excluded blacks "by grossly underrepresenting the Black concentration in Columbus"; that Taft estimates the black population of Columbus to be no more than 12%, when in fact it is between 20–22%; that Taft's "systematic underrepresentation of Blacks . . . is further indication of its failure to serve the needs and interests of the community." Also, petitioners iterate that Taft has recognized only one philosophical segment of the black community, alleging that the black groups consulted "are all economically dependent and closely tied to the white community"; that "Black groups in Columbus which are generally independent of white ties and influence, *i.e.*, those which derive their support from the Black community, and therefore are able to speak honestly and introspectively to the issue of Black interests and problems, * * * are conspicuously missing from ascertainment exhibits"; and that Taft has ignored not only economically deprived residents, but also those who are "militant." Further, with

respect to Mr. Robinson, petitioners repeat the charge that Taft has misrepresented its ascertainment efforts by characterizing its consultations with community leaders as "in-depth interviews." Finally, petitioners contend that Taft has not maintained an "on-going" dialogue with the black community. Rather, it is stated, Taft did not consult blacks in 1967, 1968, or 1969; that only in March 1970, "at license renewal time and in the face of a threat" did the licensee initiate a series of "last minute" luncheon consultations; and that only those blacks who are "dependent on the white establishment were invited" to those meetings.

14. In response to petitioners' allegations, Taft states that virtually all of the 26 black leaders consulted during the ascertainment survey are involved in welfare, housing, medical, educational, and occupational programs which affect blacks in Columbus; that the Commission has sanctioned the random selection of names from a telephone directory for ascertainment purposes (*Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 667 (1971)); that in reviewing Taft's past consultations with the black community, petitioners have ignored reports made by Taft personnel during the period from January 1969 through September 1970 (Opposition, Attachment 97), other contacts during the 1969–70 period directly related to black programming, black PSA's, and black employment (Opposition, Attachments 94–96, 98–99), and all ascertainment efforts made after June 3, 1970; and that instances of continuing ascertainment cited by Taft in the opposition were, as stated, examples only, and that many other consultations took place during the license term. Petitioners reply to this last point by stating that Taft has an obligation to provide evidence of all the contacts made during the license term.

Conclusions

15. The Communications Act requires that as a prerequisite to the grant of an application for renewal of a broadcast license, the Commission must find that the station will be operated to serve the public interest during the upcoming license term. The Commission has stated that the principal ingredient of the licensee's obligation to operate in the public interest is the diligent, positive, and continuing effort to discover and fulfill the tastes, needs, and desires of his community. *Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 25 Fed. Reg. 7291, 7294 (1960) (*1960 Programming Policy Statement*). In order to determine whether the licensee has met this obligation, the Commission designed Section IV–A (radio) and Section IV–B (television) of Part I of the renewal application to require the licensee to state the methods he used to ascertain his community's needs and interests (*i.e.*, problems), those problems which his station plans to meet during the coming license period, and typical and illustrative programs which he will present to meet those problems. In a *Report and Order* released February 23, 1971, the Commission adopted the *Primer*, *supra*, wherein we sought to clarify our policies and provide guidelines for the fulfillment of our requirements with re-

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spect to the ascertainment process. The *Primer* prescribes the methods a licensee must employ to ascertain the needs and interests of his community. Briefly stated, he first must determine the composition of the community, indicating its economic, social, racial, ethnic, and other significant characteristics. Thereafter, he must consult with the leaders of the significant segments that comprise the community and with a random sample of the general public. The purpose of these consultations is to elicit from the interviewees what they believe to be the problems faced by the community. Having completed the surveys, the licensee must list all the problems ascertained and then evaluate them to determine which problems merit treatment by the station. Finally, the licensee must propose programming designed to meet those problems.

16. A review of the applications for renewal of license of WTVN, WTVN–TV, and WBUK discloses that Taft has described the demographic characteristics of the relevant service areas (Exhibits IV–A–1, Attachments A). It found that blacks comprise 11.8% of the population of Franklin County. Based on this data, Taft management personnel interviewed 131 community leaders who represent various segments of the population. Of these leaders, 26 or 20% are blacks. In addition, the licensee sent questionnaires to 1000 residents selected at random from local telephone directories. It is stated that the distribution of mailing was weighted to reflect the concentration of the population in Franklin County. One hundred seventy-three of the questionnaires were returned. Taft tabulated and evaluated the responses from both the community leaders and the members of the public in order to determine the most important problems facing the community. Taft concluded that "the need for racial understanding is probably the single most important problem in [its] service area" (WTVN Renewal Application, Exhibit IV–A–1, p. 10). Other problems which Taft identified included lack of low and middle-income housing, poor police-community relations, lack of funds for public projects, environmental pollution, unemployment, education, taxes, urban planning, mass transit, and drug abuse. On the basis of the problems ascertained, Taft proposes to broadcast programming devoted to those problems. (See Renewal Applications of WTVN, WTVN–TV, and WBUK, Exhibits IV–A–1.)

17. Petitioners allege that, despite the foregoing, Taft has failed to comply with the *Primer*, *supra*. We disagree. First, we note that 20%, not 6%, of the community leaders interviewed are black. Also, with regard to the dispute over the percentage of blacks residing in the Columbus area, the latest available census figures disclose that, while 18.5% of the Columbus population is black, 12.5% of Franklin County is black and 11.6% of the Columbus SMSA is black.[1] On the basis of this information, it would appear that Taft has not "underrepresented" the black population of the respective stations' service areas. Moreover, we have stated that the compositional determination

[1] 1970 Census, General Population Characteristics, PC(1)–B Series (issued, October 1971).

made by the licensee would be subject to question where a significant group has been omitted. In this regard, petitioners challenging the licensee's data must do more than make mere allegations; "they must show that a significant group has been omitted, by means of supporting data." *Primer*, *supra* at 663. Petitioners have failed to submit such a showing.

18. With respect to the argument that only one "philosophical element" of the black leadership was consulted, it should be noted that the licensee has broad discretion to select from among the leaders of each significant group within the community. Since "the Commission will not substitute its judgment for that of the applicant, no ascertainment issue will arise absent specific evidence that the licensee abused his discretion in selecting persons to be interviewed or omitted a significant segment of his service area." *WSBC Broadcasting Company*, 34 FCC 2d 651, 653 (1972). In its opposition (Attachment 93), Taft lists the blacks it interviewed in connection with its consultation with community leaders. A review of the list discloses that the interviewees represent, among others, the N.A.A.C.P., the Urban League, the Columbus Voter Action Council, the Mayor's Ad Hoc Committee on Model Cities, and the Chamber of Commerce. Also, we note that three of the blacks who were interviewed signed the petition to deny. In view of the foregoing, we conclude that in selecting leaders of the black community to be interviewed Taft has not abused its discretion. Further, as to Taft's method of selecting a random sample of the public, we note that the *Primer* specifically provides that "a random selection of names from a telephone directory is sufficient for our purposes." *Primer* at 667.[2]

19. Further, concerning Mr. Robinson, Taft has included, along with Mr. Collier's affidavit, notes made by Mr. Collier at the time he claims to have spoken to Mr. Robinson (Opposition, Attachment 115). On the basis of the information before us, we do not question whether the interview took place. It is possible, however, that the purpose of the interview was not entirely clear to Mr. Robinson. But the petitioners have failed to submit facts which raise questions about any of the other 130 interviews. One deficient consultation does not render the whole survey invalid. Also in this regard, we note that, while petitioners criticize the survey methodology, they do "not dispute the applicant's evaluation of the responses and its determination

[2] We note that Taft mailed questionnaires to those residents who were selected, requesting that the recipients return their responses by mail. In adopting the *Primer*, we stated that a sampling technique wherein the person whose views are sought is to voluntarily return a questionnaire by mail produces a strong "cooperation bias" that renders almost meaningless the information gathered by this method. Accordingly, we decided to "place no reliance on this method." *Primer* at 668. Thereafter, we modified that holding, stating that the mail-returned questionnaire method may be used, "but only if the applicant submits an appropriate showing that this method has resulted in responses from members of the general public who are generally distributed throughout the community to be served." *Primer on Ascertainment of Community Problems by Broadcast Applicants. Part I, Sections IV–A and IV–B of FCC Forms*, 33 FCC 2d 394, 395 (1972). Here, Taft sent 1000 questionnaires, 675 in Columbus and Franklin County, 50 each in Delaware and Pickaway Counties, and 25 each in the remaining nine counties of the Area of Dominant Influence. Of the 173 questionnaires that were returned, 90 were from Columbus, 75 from outside the city and eight unspecified. Accordingly we conclude that Taft has surveyed members of the general public who are generally distributed throughout the service area. No information has been submitted to indicate otherwise.

of the significant community needs and interests. . . ." *WSBC Broadcasting Company, supra* at 653.

20. Finally, with reference to Taft's consultations with blacks from 1967–1970, we have no information before us to indicate that Taft failed to maintain an on-going dialogue with the significant groups within its service area. By merely stating that Taft has not sustained such a dialogue, petitioners have only made a conclusory allegation rather than a specific allegation of fact (par. 7, *supra*). Taft has submitted examples of the ascertainment efforts that it made during the past license term; on the basis of petitioners' general allegations, Taft is not obligated to provide evidence of all its consultations during that period.

PROGRAMMING TO MEET THE NEEDS AND INTERESTS OF THE BLACK COMMUNITY

21. Petitioners allege that Taft has failed to broadcast programming which adequately met the needs and interests of the black community in the Columbus area. Noting that the city has a history of racial tension marked by disorder, petitioners contend that Taft has made no effort to honestly portray black problems and feelings to its audience. Further, it is stated that Taft refuses to recognize "that there is a Black perspective to news and programming . . . and [that it] continues to assert its own interpretation of Black people's needs and interests."

22. Petitioners cite several examples of this alleged failure to serve the needs of the black community. For instance, in noting that the rates of unemployment and underemployment of blacks exceed those of whites, petitioners allege that WTVN–TV and WBUK do not present regularly scheduled programs devoted to employment opportunities. Further, it is averred that WTVN carries only "irregular spot announcements regarding employment" and that these are "uninformative and misleading."

23. A second example involves a news conference held by the Afro-Set. Despite the fact that WTVN–TV news personnel were in attendance, the station, it is alleged, failed to mention the news conference during any of its subsequent broadcasts. It is argued that WTVN–TV's failure to treat the Afro-Set as a newsworthy source indicates the "station's extreme insensitivity and seeming unawareness of the diverse groups within the community." The members of the Afro-Set questioned the station's management about this matter and were informed that it would be investigated. However, the station did not thereafter contact the group. Instead, some months later, WTVN–TV informed the local N.A.A.C.P. that the conference was not reported because the cameraman had forgotten to take the lens cover off the camera. The station's failure to reply directly to the Afro-Set, contend petitioners, constitutes further evidence of Taft's refusal to recognize the diversity of viewpoints within the black community.

24. In addition, petitioners allege that Taft has a politically conservative "one-sided" editorial policy which influences the stations'

news coverage and prevents the widest possible dissemination of information from diverse and antagonistic sources. For example, petitioners cite the events following the shooting of a black youth by Columbus police. It is alleged that on February 15, 1970, WTVN provided continuous coverage of the efforts made by the Fraternal Order of Police to elicit signatures from persons in support of the police. By way of contrast, petitioners aver that despite the preparation of N.A.A.C.P. press releases, WTVN did not report the N.A.A.C.P.'s campaign "to elicit community support for the suspension of the policeman involved."

25. Also, they cite a panel discussion presented by another station in which Mr. Bill Patterson, a Taft news reporter, participated. According to the petitioners, the panel was convened to enable spokesmen to discuss the "views of the Black community regarding the tumultuous events surrounding the shooting of" the young black. However, it is alleged that Mr. Patterson was instrumental in preventing an honest dialogue; that rather than elicit the views of the black participants, the interviewers questioned their credentials as spokesmen for the black community. Further, it is stated that the newsmen present clearly attempted to conceal and discredit the views of the black community.

26. Finally, petitioners allege that WTVN has not broadcast music that is relevant to the black community. To support this charge the Coalition summarized the results of monitoring conducted by one of the petitioners, Mr. Tony Rocciano. It is stated that the station rarely presented black performers, and that of those presented, none were "contemporary Black performers except for established, and establishment, artists like Louis Armstrong, the Mills Brothers, or the late Nat King Cole."

27. In opposition to the allegations made by the Coalition, the licensee states that its stations have made substantial efforts to serve the Columbus black community. In support of this statement, the licensee summarizes that programming which was presented to meet the needs and interests of the blacks in the Columbus area.

WTVN

(1) "Like It Is"—It is stated that this is a regularly scheduled weekly local public affairs program designed specifically to deal with problems of particular concern to the black community. The program was first broadcast in December 1969 and is presented each Sunday evening from 8:15 to 8:30 p.m. Some of the topics discussed during the past license period include local civil rights problems, Model Cities, the police shooting of a black youth, formation of a new black organization, the need for an accurate census of the black community, recruitment of blacks for the Columbus police force, local credit union assistance being offered to blacks, establishment of new black businesses, inter-racial living, black membership in Columbus trade unions, and voter registration in black areas of Columbus. The licensee states that among the guests presented on the series were a number of the individuals who have signed the petition to deny.

(2) "Conversation"—This public affairs program, broadcast on Sunday evenings from 10:15 to 10:30 p.m., has often been devoted to the discussion of issues which are of direct interest to blacks. Examples of such topics presented during 1969 include the following: black capitalism; the United Community Council; local racial violence; police review board; state employment training center; and Race Unity Day.

(3) "Speakout"—This is a regularly scheduled one hour local public affairs program which is broadcast by WTVN on Sunday evenings at 9:00 p.m. The licensee attaches a list of topics of interest to blacks which were discussed during several of the "Speakout" programs in 1969, including the "shooting deaths of three young blacks," participation in the 1970 Census, the Columbus Community Relations Department, educational opportunity, housing and employment problems faced by minority groups, and black membership in labor unions. Further, the licensee contends that other "Speakout" programs, while not directly related to black problems and interests, were nonetheless of concern and relevance to black people. Among these were programs devoted to discussions concerning consumer problems and insurance rates.

(4) "Ohio Report"—Another regular weekly public affairs program. "Ohio Report" presents local, state and national leaders on Sundays from 10:00 to 10:15 p.m. On two occasions blacks were guests on the program. One of these programs was devoted to a discussion with a member of Afro-Am of problems at Ohio State University, located in Columbus. Afro-Am is one of the groups which signed the petition to deny. Further, many of the topics discussed were of interest to black citizens, *e.g.*, consumer protection legislation, vocational-technical education, and air pollution and other environmental control problems.

(5) "Ohio Education Report" and "Columbus School Report"—The first program is described as a "daily three-minute education feature"; the second, a "weekly 15-minute education program." Some of the topics discussed on these programs which were of direct interest to the black community include "Negro history, adult education, special education programs for culturally disadvantaged children, problems relating to the testing of minority groups, the role of Black male children in classrooms, [and] Black studies programs."

(6) "Insight"—This is a series of 25-minute programs devoted to history. It is broadcast on Sundays at 8:35 p.m. During 1970, three of these programs were devoted to the history of blacks in the United States. Taft states that the programs were calculated to stimulate black pride and black self-recognition.

28. In addition to meeting community needs through public affairs programming, WTVN also "presents news on an hourly basis, 24 hours a day." With regard to serving the black community, it is stated that the station takes an affirmative approach, reporting more than "crisis news." Attached to the opposition are examples of the station's coverage which "illustrate the news philosophy of the station" (Opposition, Attachments 75–87). For instance, twenty-one stories covering the N.A.A.C.P. (one of the petitioning groups) are cited, twelve of them including interviews with Mr. Ball, who signed the petition for the N.A.A.C.P. With particular reference to petitioners' allegation that

the station failed to report the N.A.A.C.P.'s petition in support of the suspension of policemen involved in the shooting of a black youth. Taft submits copies of six stories which were broadcast from February 4 to February 10, 1970. It is stated that each of the stories gives coverage of the N.A.A.C.P.'s position and its petition drive, and that many of the stories were broadcast several times.

29. Other instances of the station's news reporting include the following: two stories concerning the N.A.A.C.P.'s allegations that Western Electric had been guilty of discrimination; 15 stories dealing with The Committee, one of the petitioning groups; four reports concerning events at Ohio State University which involved Afro-Am, another petitioning group; two stories regarding the Columbus Civil Rights Council, also a petitioning group; two reports dealing with the Afro-Set's efforts to eliminate prostitution from the "Main Street area"; and two stories concerning the Columbus Broadcasting Coalition (petitioners).

In addition to these reports, the licensee also states that WTVN has presented coverage of other subject matter of interest to the black community, including Model Cities, the Urban League, the United Negro College Fund, the Columbus Black Brothers Coalition, black history week, black community feelings about a new school bond issue, and the Columbus black newspaper, *The Call and Post*.

30. Taft also states that its stations' public service announcements (PSA's) constitute an important aspect of its total broadcasting service. In an effort to encourage "[s]mall and unsophisticated community groups" to effectively use the broadcast media, Miss Tish Martin of WTVN prepared the "Public Service Handbook." It is stated that this booklet was specifically designed to help members of the black community use public service facilities effectively.

31. As to the PSA's presented, Taft avers that hundreds have been broadcast by WTVN for the benefit of such groups as the United Negro College Fund, the Ohio Civil Rights Commission (one of the petitioners to deny), the Urban Education Coalition, the Legal Aid and Defender Society, Voter Registration, the Martin Luther King Memorial Movie, Send a Child to Camp, Day Care Centers, and the Housing Opportunity Center of Columbus. Also, WTVN presents Bulletin Board announcements hourly. Taft attaches "a list of 129 primarily Black bulletin board announcements broadcast by WTVN" during the four months preceding the filing of the opposition (Opposition, Attachment 92). It is stated that church groups, YMCA, civic action groups, Model Cities activities, education projects, and youth activities were mentioned. Taft notes that four of these announcements were presented for the Columbus Civil Rights Council, one of the petitioners to deny.

WTVN-TV

(1) "Facts and Opinions"— It is stated that this is a series of daily, weekday local public affairs 15-minute segments which are telecast each morning during WTVN-TV's "Today-format program, 'Daybreak.'" The renewal application contains a list of the topics covered and the individuals participating during 1970. Taft states that the

programs are designed to provide meaningful dialogue between the various segments of the Columbus community, particularly between blacks and whites. Among the topics discussed are the following: employment and housing problems experienced by blacks; drug abuse; Black History Week; recruitment of blacks for the police force; consumer protection; Model Cities; black emerging business; and the Urban League. Taft points out that "of the 98 'Facts and Opinions' programs listed in the renewal application, 21 (more than 20%) were devoted to employment topics, a subject of particular concern to the petitioners to deny."

(2) "Reporters Roundtable"—This is a regular series of weekly local public affairs discussion programs, "numerous editions" of which have "been devoted to inner-city issues and matters of concern to Blacks." The licensee notes that one program was devoted to Afro-Am, one of the groups signing the petition to deny. Further, many of the programs were conducted by black WTVN–TV newsmen.

(3) "Specials"—The renewal application contains a list of special programs broadcast by the station during 1969 and 1970. It is stated that among these are programs devoted to subject matter which should be of interest to all Columbus area residents: debates by candidates for Governor and U.S. Senator; Presidential news conferences; urban renewal; the problem of environmental deterioration; the economy of the 1970's; an account of the life of Robert F. Kennedy; problems of adoption; problems of the city and city planning; anniversary of Dr. Martin Luther King's death; summer recreation programs; and inflation. Of special interest to blacks was the "Summer Focus" series presented during 1969, which covered such topics as Operation Breadbasket, black studies on college campuses, welfare, recruitment of blacks into business and politics, and the general problems of race relations and prejudice. Further, the licensee notes that in 1970 the station produced two prime time local public affairs programs—"Come Tumbling Down" and "The Opening Door" which are cited as "important examples not only of the WTVN–TV's efforts to be sensitive to local Black needs and problems, but also as examples of the use of in-depth reporting and follow-up by the station in an attempt to get something done in the community." It is stated that the first program dealt with inner city renewal of slum areas, while the second was devoted to blacks and unions in Columbus. Finally, Taft points to its prime time coverage of a thirty-minute news conference held by The Committee, a local black group which joined in the petition.

32. As to the station's presentation of news, Taft first observes that its news staff grew from seven members in 1967 to 19 in 1970. Three of those 19 employees are black reporters. The licensee attaches to the opposition transcripts of news stories presented by the station which covered matters of interest to the black community (Opposition, Attachments 70–74). Included is a collection of 27 reports on five of the groups which signed the petition to deny—the Broadcast Coalition, the N.A.A.C.P., the Columbus Civil Rights Council, Afro-Am, and Afro-Set. As examples of the station's "coverage of positive news of the Black community," Taft cites stories concerning black-owned businesses, a black fashion show, black beauty contests, a downtown

clean-up project, a children's art show, the appointment of a local black man as superintendent of a correction institution, a local recreation center, and efforts to establish better relations between the community and police. Other examples of news report topics relevant to blacks in Columbus include black history, art and culture; the quality of inner-city education; slum housing; and police department efforts to hire blacks. Also, as to the most recent period preceding the expiration of the past license term, Taft states that from June 1 through September 11, 1970, WTVN–TV presented at least 250 separate news stories directly involving black people or black problems.

33. With reference to PSA's, Taft attaches a list of more than 700 announcements presented from January through August 1970, "which related directly to matters of interest to the Black community." These announcements concerned such matters as police recruitment (134), the 1970 Census (48), equal employment (50), and the Martin Luther King film (44). The licensee also points to announcements made on behalf of local organizations—the local Miss Americolor Pageant, the Black Culture Club, the Eastside YMCA, and the Ohio State African Musical Exhibit. Finally, Taft observes that all of these announcements are in addition to the 218 broadcast by WTVN–TV during 1969 and 1970 concerning employment and training.

WBUK(FM)

34. Taft states that this station seeks to serve the community and increase the diversity of programming available to Columbus residents through its music and news programming. Nevertheless, Taft avers that the station does broadcast some public affairs programming as well as presenting daily Taft editorials. In addition, Taft states in the renewal application that the station will initiate a new weekly public affairs program which will be broadcast at 10:30 p.m. on Wednesdays. In describing the program, Taft notes that a significant amount of time will be devoted to problems which are of particular concern to blacks in Columbus.

Miscellaneous programming allegations

35. As to petitioners' allegations concerning news coverage of the Afro-Set, the licensee first points out that WTVN–TV presented a lengthy news report concerning the group; that one program in the "Like It Is" series was devoted to the Afro-Set and its efforts to eliminate prostitution in the "Main Street area" of Columbus; and that WTVN presented news reports about the group's activities. With regard to the Afro-Set's press conference, Taft admits that no film of the event was broadcast. Nevertheless, it is stated that a story was written by the reporter who attended the conference and a WTVN–TV news woman; that they consulted with the police department for information concerning the group's allegations of police harassment; that the department's response was included in the story; and that the story was presented on the 11:00 p.m. WTVN–TV local news report that night, April 21, 1970. Subsequently, on June 9, 1970, the station presented a filmed interview with Nommo, leader of the Afro-Set. Thereafter, it was decided to devote an entire 30-minute "Reporter's Roundtable" to the group. It is stated that Nommo agreed to hold a

taping session on June 30 at 1:30 p.m. in order that the program could be broadcast on July 5. However, on the morning of June 30, the taping session was cancelled by Nommo.

36. In answer to the petitioners' allegations concerning programming devoted to employment problems, the licensee states that WTVN–TV's concern in this area is "long-standing." As mentioned above, 21 segments of "Facts and Opinions" were devoted to employment topics. Further, it is stated that a number of "Reporters Roundtables" were also devoted to employment, including a program with the Columbus Black Brothers Coalition, a discussion of a youth self-help program, and a discussion of a program to train school dropouts to become teachers' aides. In addition, earlier in the license period (from October 27, 1967, through January 17, 1968), the station presented daily one-minute job opportunity reports as a regular part of its 11:00 p.m. news program. According to the licensee, "particular emphasis" was placed "on job availabilities for persons with limited educational and training qualifications." Finally, Taft states that its continuing concern about employment problems is reflected in WTVN–TV's regular public service announcements. During the 18-month period prior to the filing of the renewal application, the station presented the following announcements: 1—Ohio State Employment Services; 47—Job Corps; 56—rehabilitation employment; 40—equal employment; 24—National Alliance of Businessmen; 19—Eastland Vocational Education; 5—Department of Labor; 5—Columbus Career Conference; 13—technical career opportunities; and 8—Jaycee Able Men Program.

37. In response to the allegations about the news conference in which Mr. Patterson was allegedly "instrumental in preventing an honest dialogue," Taft states that since The Committee was a new group, Mr. Patterson believed that viewers and listeners would want to know who its members were. Further, Taft notes that the news conference was broadcast on WTVN–TV in its entirety, in prime time, the same day it was held and also was broadcast in its entirety on the "Like It Is" program on WTVN. In his statement (Opposition, Attachment 131) Mr. Patterson further justifies his conduct by asserting that the "full viewpoint" of the interviewees had been presented by the time the program was completed.

38. Further, Taft characterizes as "wrong" petitioners' allegation that the stations' editorial comment "is one-sided," stating that editorials are one-sided only to the extent that they reflect the views held by one licensee. Also, it is stated that reply editorials are a regular and frequent part of the editorial comment presented by the licensee's Columbus stations.

39. With reference to Mr. Rocciano's monitoring of WTVN in 1967, Taft first notes that while it has not retained its play lists from that year, the music played at the time the renewal application was filed was similar to that presented in 1967. Accordingly, the station argues that petitioners' allegations that the station rarely presents the recordings of black performers and never presents non-"establishment" blacks is wrong. It is stated that the station has presented many black performers who do not fall within the petitioners' classification.

To support this statement, the licensee includes the names of black performers whose recordings were played on the station during a two-week period in August 1970 (Opposition at 78–79). Further, the licensee defends the entertainment formats of both stations by arguing that their programming "contribute[s] significantly to the music diversity in [the] market." It is stated that of the remaining 10 commercial stations in Columbus (five AM and five FM), five offer substantial schedules of "soul," "rock," "underground" and/or jazz; three offer country and western; and two provide background music. By way of contrast, Taft avers that WTVN presents bright and contemporary pop standard music primarily designed to appeal to adult tastes, while WBUK offers "'good music,' including some semi-classical and light classical music."

40. Finally, Taft contends that petitioners' complaints relate to the quality or style of the music played on the stations; that such considerations are matters of personal taste; and that personal musical preference is not an appropriate basis for a petition to deny.

41. Petitioners, in reply, contend that Taft has failed to refute their allegation that the stations have not presented sufficient programming to meet the needs and interests of blacks in Columbus. Concerning WTVN, petitioners state that Taft has presented only 2 hours and 51 minutes of regularly scheduled public affairs programming per week; that 90 percent of this programming was broadcast between 8:00 and 10:30 p.m. on Sunday evenings; that prime time for radio comprises the weekday commuting hours (7:00 to 9:00 a.m. and 4:00 to 6:00 p.m.); that no programming related to the problems of the black community was broadcast during these hours; and that only 18 minutes per week, excluding Sundays, were devoted to programming that was "remotely" relevant to blacks. Further, it is alleged that in 1970 the time devoted to programming which dealt with problems directly relating to blacks totalled 13 hours and 51 minutes, or 32 minutes per week. Since most of the programming cited by Taft was initiated in 1970, and since Taft offers "only a few examples of 'relevant' programming for 1969 and none for 1967 and 1968," petitioners conclude that WTVN has served blacks only at "renewal time."

42. Having found that the station did not present enough programming for blacks, petitioners then criticize that which was broadcast, stating that many of the programs cited by Taft as being relevant to black needs and interests were, in fact, mass appeal offerings of only general interest to blacks; that the programs were too "bland"; and that Taft refused to recognize the diversity of viewpoints within the black community.

43. As to the news programming, petitioners state that no black member of WTVN's news staff occupies an editorial or policy-making position, thus assuring that all news will be reported from a white viewpoint; that events pertaining to blacks and/or black organizations are seldom reported by WTVN; that a review of Taft's opposition reveals that only 40 news stories relevant to the black community were broadcast from January through June 1970; that most of these were 10 to 30 second spot news items; and, accordingly, that WTVN presented only approximately 30 minutes of black news in the first six

months of 1970. Moreover, petitioners attack the content of these news stories, repeating the charge that the station provided "biased coverage" of the events following the police shooting of a Columbus black youth. In this regard, it is stated that the station extensively reported the police's drive for community support while all but ignoring the N.A.A.C.P. petition advocating suspension of those policemen involved in the shooting and establishment of a civilian review board. It is again alleged that the station did not present the N.A.A.C.P.'s press release calling for the suspension of the police. Also, as further proof of the station's alleged failure to present "balanced" news coverage, petitioner's contend that instead of reporting the problems of police brutality, the station focused its attention on a local boycott of a supermarket chain.

44. Concerning WTVN–TV, petitioners state that Taft's record of television programming to meet the needs and interests of blacks is "even poorer" than that of the AM station. Specifically, it is alleged that only about 30% of the "Facts and Opinions" broadcast time was devoted to topics directly relating to the black community; that a listing of these programs indicates the station's "patronizing attitude toward the black community and its willful misrepresentation of its 'commitment' to the black population of Columbus"; that program titles such as "The Decay of the Family Unit," "Child Abuse," and "Children in Jail," when cited in the context of programming to serve blacks, are implicitly racist and explicitly derogatory; that while admittedly such programs meet certain problems, the station has ignored the problems blacks confront in trying to deal with institutions in a city dominated by whites; that a program entitled "Stocks and Investments," could not be relevant to most blacks in Columbus; and that Taft took advantage of its sponsorship of a two-week summer camp experience of one black child to "parade him in front of the television cameras as living proof of [the station's] 'commitment' to helping solve Black problems." As to the "Reporter's Roundtable" series, petitioners state that in 1970 only ten programs related to the black community; that Taft does not state the days or times the programs were presented; and that Taft points to no black producer, director or any other policy-making personnel who participate in the presentation of the series. With regard to this last point, petitioners contend that Taft cannot accurately portray the black community in the absence of blacks in positions of responsibility. Further, petitioners condemn Taft for citing each appearance of a black newsman as interviewer, stating that the licensee believes that the appearance of a black face is the answer to the needs and interests of Columbus blacks.

45. Petitioners also condemn the station's news programming, finding that only 29 "Black news items" were presented by the station during the first six months of 1970. Further, petitioners repeat their claim that WTVN–TV failed to treat the Afro-Set as a newsworthy group. It is argued that the station "did not seek out information regarding the Afro-Set," but only became aware of the group when it called a press conference. More important, however, is Taft's purported attempt to misrepresent its subsequent contacts with the group.

For instance, petitioners alleged that none of the employees who stated that the station reported the news conference was willing to sign an affidavit to that effect. As to the interviews with Nommo, petitioners state that they have no bearing on the charge that the station has ignored the Afro-Set and that the June 9, 1970, interview should not be considered since it was conducted in contemplation of this proceeding.

46. With respect to other matters raised in the petition to deny, petitioners first refer to Mr. Patterson's participation in The Committee's news conference, maintaining that he "willfully tried to discredit the Committee and, by extention, the Black community"; that the interviewers failed to explore the substantive issues; and that Taft newsmen "deliberately hindered the dialogue." Petitioners complain that by presenting the news conference twice, first on WTVN–TV, then on WTVN, Taft displayed insensitivity to blacks in that it "gave a large audience the chance to see representatives of the Black community in a very unfavorable light—not just once, but twice, and in prime time." Further, petitioners allege that Mr. Patterson has lied to the Commission and the black community concerning the news conference, and that he has, on other occasions, exhibited a "patronizing attitude" toward blacks, belittling them and their viewpoints.

47. Petitioners calculate that from 1961–1970, Taft stations broadcast 3000 to 3500 editorials; and that of these, only 30, or 1%, were relevant to the black community. Moreover, petitioners object to the content of the editorials, claiming that the positions taken by Taft indicate "that Blacks have been consistently underrepresented and negatively portrayed in all aspects of Taft station programming." Petitioners complain that Taft editorialized against the expenditure of $70,000 to open special voter registration facilities; that Taft urged unemployed blacks to apply to the Columbus Broadcast Skills Bank, a sham organization; and that Taft encouraged more blacks to become policemen, indicating "that only Blacks can control other Blacks." Further, Taft is accused of "twisting language and quoting out of context" when the stations cite Supreme Court Justice Thurgood Marshall and commentator Carl Rowan. Also, it is stated that Taft "has been guilty of glossing over the problems" of blacks and of "refusing to deal with difficult racial issues," thus contributing to racial tensions. Finally, petitioners allege that Taft's reply policy prevents "honest and open Black participation" because a request to reply will be considered only if certain conditions are met—the issue must be controversial; the person or group must be responsible; the opposing viewpoint must be a significant one; and the request for reply time must be submitted within one week of the broadcast.

48. As to the music presented on WBUK, petitioners claim that the licensee has failed to adequately answer the charge that the station's format does not reflect black tastes. To further support their allegations that blacks are systemmatically excluded from station operations, petitioners state that the station's record albums which feature black performers bear comments such as "use only on weekends," "use sparingly," "not our sound," and "too soulful"; that only when threatened by a petition to deny did the station begin to present "a few token

Black artists"; that of those presented, few are now living and most are (or were) "super-stars"; that Taft discriminates against those few artists "who can be said to project a more positive and contemporary Black image by presenting them at night (10:00 p.m. to 4:00 a.m.), by "play[ing] side 'two' of the hits," or by presenting "the hits of Black artists performed by whites."

49. In response to the criticism of the programming presented by WTVN and WTVN-TV to meet black needs and interests, Taft states that petitioners have considered only those programs which, they have subjectively determined to be relevant; that they have failed to offer either "support or explanation" for these choices; and that they have ignored programming which served all groups in the community (*e.g.*, discussion of consumer topics or insurance rates). As to certain specific points, it is noted first that those programs whose titles petitioners found to be racist and derogatory are referred to in a list of *all* "Facts and Opinions" programs; they were not cited as programs concerning "Black-related topics." Similarly, Taft states that it never suggested that the "Facts and Opinions" program on stocks and investments was specifically relevant to the black community. With regard to the child who was sent to camp, Taft states that he appeared in connection with a discussion of the need for more "Big Brothers" to help black youngsters.

50. Also, Taft notes that the WTVN news stories cited in the opposition constituted only examples of many reports which were relevant to the black community; that stories from 1970 were selected to avoid the burden of sorting through voluminous past records; and that petitioners' figures "bear no relation even to the number of examples which were given" since "there are 46 examples of programs *dealing with groups signing the Petition to Deny alone*." The same general comments are made concerning WTVN-TV's news programming. Taft observes that while petitioners find only 29 news items which were relevant to blacks, in fact "[t]wenty-seven news stories were given as examples in the Taft Opposition *dealing with groups which signed the Petition to Deny alone*."

51. As to specific issues raised regarding the Afro-Set, Taft argues that a local black newspaper, *The Organizer*, reported only three days before the news conference that the Afro-Set was a new group in Columbus; that the news conference was reported and that signed statements detailing the coverage were submitted; and that the subsequent interview with Nommo was not broadcast in contemplation of this proceeding. With regard to editorial policy, it is asserted that the petitioners' disagreement with Taft's positions does not create an issue which would warrant denial of a license renewal application. Also, Taft notes that petitioners ignored the examples of reply editorials broadcast by its stations. Finally, with reference to the music programming presented by the radio stations, Taft argues that petitioners' attack is based solely on personal taste; that WBUK has never excluded black performers; and that allegations of discrimination against black artists are unsupported and untrue.

52. In reply, petitioners contend that Taft's response is defective because no criteria for the evaluation of programming has been offered; that Taft erroneously assumes that any program of interest to the entire community is sufficient to meet the needs of the black residents of Columbus; and that Taft has failed to determine whether or not the programs selected were responsive to black needs and interests.

Conclusions

53. The Commission has stated that programming is of the essence of broadcast service. *1960 Programming Policy Statement*, *supra*, at 7294. In order to qualify for renewal of license, a broadcaster must show that during the past license term he has presented programming responsive to the needs and interests of his service area.[3] In reviewing the licensee's performance, the Commission must maintain "a balance between preservation of a free competitive broadcast system, on the one hand, and the reasonable restriction of that freedom inherent in the public interest standard provided in the Communications Act, on the other." *1960 Programming Policy Statement* at 7293. Accordingly, the licensee is accorded wide discretion in his choice of programming to meet the needs of his community, and the Commission will act where questions are raised about the reasonableness or good faith of the licensee's judgment. We will not condition grant or denial of a renewal application upon a subjective determination of what is or is not a good program; rather, our decision must be based on an analysis of the responsiveness of the station's overall programming performance. Therefore, under the circumstances presented here, petitioners must make specific allegations of fact which, if true, would establish that the licensee's overall programming could not reasonably have met the needs and interests of the people within its service area, including the black community. It is with that standard in mind that we evaluate the programming of Taft's stations.

54. In the petition to deny, several examples of Taft's alleged failure to adequately serve black needs and interests are cited. The licensee has responded to each of these allegations, and we conclude that no substantial and material questions of fact has been raised. First WTVN–TV devoted a substantial amount of broadcast time (as summarized in para. 36, *supra*) to the presentation of employment information. In this regard, we note that the Commission will not require that a licensee adhere to a particular format in his efforts to meet a problem. Accordingly petitioners' complaint that the station does not broadcast "regularly scheduled programs" concerning employment lacks merit. Absent specific allegations indicating that the licensee could not reasonably expect his treatment of a particular issues to be effective, no Commission action is warranted. As to WBUK, no information has been submitted with regard to employment programming. Nevertheless, we note that the licensee's past programming, as disclosed by the composite week figures in the renewal application.

[3] "[I]n a renewal proceeding past performance is [the] best criterion. . . . [A] renewal applicant . . . must literally 'run on his record.'" *Office of Communication of United Church of Christ* v. *F.C.C.*, 123 U.S. App. D.C. 328, 359 F. 2d 994 (1966).

included 10.6 per cent news, 0.9 per cent public affairs, and 2.9 per cent all other programming, exclusive of entertainment and sports. In addition, the station broadcast 415 public service announcements. In serving the needs of his community, the broadcaster is not required to program to meet all community problems; rather, a licensee may determine in good faith which problems merit treatment by the station. In making this determination, he may consider the particular format of the station, the composition of his audience, and the programming offered by other stations in the community. *Primer*, *supra*, at p. 673. We have been presented with no information which indicates that Taft has failed to reasonably and in good faith determine which problems merit treatment by WBUK, or to present programming on the station which is responsive to those problems. Concerning the allegation that the employment information presented on WTVN is "uninformative and misleading," we note that petitioners have not cited any particular announcements or series of announcements to substantiate their argument. Rather they merely complain that generally little or no information is offered regarding qualifications, location, and range of pay. Again, petitioners' allegation lacks the requisite specificity.

55. With regard to Taft's alleged failure to report the Afro-Set's news conference, we conclude that the licensee has adequately refuted petitioners' charge by stating that, while WTVN–TV did not present film of the conference, it did broadcast a news story about the conference.[4] Moreover, even if the station had failed to cover the conference no Commission action would be warranted. We will not interfere with the licensee's judgment as to what constitutes a newsworthy event. Only where a pattern emerges which indicates that the licensee has consistently failed to respond to an issue of public importance, which, under the circumstances, he could not reasonably or in good faith ignore, will the Commission intervene. *See Radio Station WSNT, Inc.*, 27 FCC 2d 993 (1971). Further, in considering the programming devoted to the Afro-Set and its leader, Nommo, we find no basis for concluding that WTVN–TV has failed to treat the group as a "newsworthy source," or that Taft is unaware of "diverse groups within the community."

56. Again, we find no support for petitioners' allegation that WTVN did not provide news coverage of the N.A.A.C.P.'s petition drive. The licensee, in its opposition, has refuted this allegation, citing the reports broadcast by the station. In reply, petitioners modify their complaint, charging the station with "biased" and "unbalanced" coverage of these events. With respect to an allegation that news coverage was "biased," we have held that Commission action is not warranted

[4] Petitioners' comment that the employees who attested to the broadcast of the report (Opposition, Attachments 119 and 120) failed to sign affidavits to that effect is unavailing in the absence of information to indicate misrepresentation by the licensee. Also, in its response to the reply, Taft stated that a report concerning the news conference was broadcast. Frederick H. Von Stade, a Vice President of Taft Broadcasting Company and the station manager of WTVN–TV, swears in an affidavit that all the statements in that pleading "are true and correct to my personal knowledge and/or as shown by contemporaneous records of the station" (Attachment R).

absent extrinsic evidence of deliberate distortion of the news; that the government should not interfere with the free exercise of journalistic judgment; and that the Commission is not the national arbiter of the truth. *In re Complaints Concerning CBS Program, Hunger in America*, 20 FCC 2d 143 (1969). As to the issue of "balanced" coverage, it would appear that petitioners are alleging that Taft failed to comply with the fairness doctrine, which requires a licensee who presents one side of a controversial issue of public importance to afford reasonable opportunity for the presentation of contrasting viewpoints. *Application of Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10415 (1964). Petitioners offer no specific facts in support of their allegation, nor do they set forth reasonable grounds for concluding that Taft, in its overall programming, has not attempted to present the N.A.A.C.P.'s position. Under similar circumstances, we have held that it would be unreasonable to require a licensee to specifically disprove such allegations, absent detailed and specific evidence of failure to comply with the fairness doctrine. *In Re Complaints by Federation of Citizens' Associations of the District of Columbia by Allen C. Phelps*, 21 FCC 2d 12 (1969). Accordingly, no action is warranted here.

57. Petitioners' allegations concerning Mr. Patterson's conduct during a discussion program involving representatives of the black community are also without merit. A complaint that the interviewer is "patronizing" or that his questions are not relevant to the most important issues can only be resolved on the basis of a subjective judgment. Just as this Commission will not decide what is or is not a good program, we will not interfere with the exercise of the licensee's news judgment in order to decide what is or is not an appropriate question. Also, in this regard, while petitioners and Mr. Patterson appear to disagree as to certain details surrounding the arrangements made to broadcast the news conference, petitioners offer no evidence to indicate that Mr. Patterson intended to mislead the Commission concerning these matters.

58. Having considered these specific complaints about the stations' programming, we turn to the petitioners' allegations that Taft's overall programming has failed to adequately serve the needs and interests of blacks in Columbus.[5] We conclude that petitioners have not substantiated these allegations. As summarized above (pars. 27–33, *supra*), both stations have presented programs devised specifically for blacks as well as programming which has a wider range of appeal. Petitioners contend, however that neither WTVN nor WTVN–TV broadcast *enough* programming to adequately serve blacks. The Commission, in determining whether a renewal applicant has met the public interest standard, examines the station's informational programming—*i.e.*, news, public affairs, and all other programming, exclusive of entertainment and sports. We have not, however, adopted any quantitative

[5] With the exception of the allegations concerning WBUK's music programming and the Taft editorials, all of petitioners' complaints in this regard are directed to the programming offered by WTVN and WTVN–TV.

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standards by which to measure a licensee's performance in this area.[6] Similarly, no quantitative standards have been set to govern the coverage of a particular issue or problem.

When considering these figures, it should be kept in mind that "[i]t is the licensee . . . who must determine what percentage of the limited broadcast day should appropriately be devoted to news and discussion or consideration of public issues, rather than to the other legitimate services of radio broadcasting. . . ." *Editorializing by Broadcasting Licensees*, 13 FCC 1246, 1247 (1949). Rather, we have recognized that the licensee may be faced with conflicting and competing needs of various groups within his service area. How he responds to these needs is a matter left largely within his discretion. "[H]e may not flatly ignore a strongly expressed need; on the other hand, there is no requirement that a station devote twenty per cent of its broadcast time to meet the need expressed by twenty per cent of its viewing public." *Stone* v. *F.C.C.*, D.C. Cir. Case No. 71–1166, Slip op. at 18–19 (June 30, 1972). The facts before us do not indicate that Taft has ignored the problems which are of concern to blacks. Moreover, it appears that petitioners' complaints about the amount of programming devoted to black needs stem, in part, from their rejection of the content of certain Taft programs. This explains the variance between Taft's figures and those of the petitioners. Apparently, the Coalition believes that a program which is devoted to a problem which concerns Columbus residents in general, rather than blacks in particular, should not be treated as broadcast matter to serve black needs. But, such a distinction has not been sanctioned by the Commission, for we have stated that

> many types of programming cannot be broken down into that for Black people and that for others. Were the Commission to require such a breakdown of programming according to the racial composition of the city of license, we would effectively be prohibiting the broadcast of network and other nationally presented programming. Without addressing ourselves to the legality of such a requirement it is sufficient to say that such "separate programming" is not feasible. See also our discussion of this matter in *Capitol Broadcasting Co.*, 28 FCC 1135 (1965).

The Evening Star Broadcasting Company, 27 FCC 2d 316, 332 (1971), *aff'd sub nom. Stone* v. *F.C.C.*, *supra*.

59. Petitioners also criticize Taft for presenting programming which is "bland," "patronizing," and "derogatory." These criticisms are linked to petitioners' allegations that Taft has refused to recognize the "Black

[6] The composite week figures for each of the stations are as follows:

	Hours	Minutes	Percent of total time on air
WTVN—Total hours of operation during composite week, 162.5:			
(1) News	22	16	13.7
(2) Public affairs	4	58	2.4
(3) All other programming, exclusive of entertainment and sports	7	26	4.6
WTVN–TV—Total hours of operation during composite week, 127.8:			
(1) News	7	25	5.8
(2) Public affairs	2	12	1.7
(3) All other programming, exclusive of entertainment and sports	9	48	7.7

perspective," that the absence of black employees in editorial or policy-making positions guarantees that news and public affairs programming will be presented from a "white viewpoint," and that blacks are "negatively portrayed." Accordingly, in calculating the amount of programming devoted to black needs, petitioners evidently exclude those broadcasts which exhibited one or more of these deficiencies. The Commission cannot, however, for two reasons, ignore those programs. First, these factors are highly subjective in nature and cannot be analyzed in the context of a review of the licensee's overall programming. Second, these objections lack the requisite specificity. "They are largely conclusory and in most instances are not tied to specific programming. Where they are so tied, they fail to indicate whether nonblacks are accorded different, more positive treatment." *Stone* v. *F.C.C.*, *supra*, at 19–20 (footnote omitted). Similarly, the allegation that blacks are "consistently underrepresented" in the stations' programming is also general in nature. Petitioners do not provide any evidence to indicate that Taft has consciously excluded blacks from its broadcasts.

60. Also with regard to the amount of programming presented to serve blacks, we note that the licensee offers *examples* of its news coverage. Petitioners treat this information as a showing of *all* such news programming for that period, and assert that the licensee's performance was inadequate. In the face of such a general allegation, the Commission does not expect a licensee to submit a complete and detailed review of all his programming. This is especially true in circumstances such as these, where the licensee, through the citation of examples, is able to establish that he has operated a service which was responsive to the needs of its community.

61. Another objection raised by petitioners which relates to the showing made by Taft concerns the period of the license term during which many of the cited programs, news reports, and editorials were broadcast. Petitioners allege that there are few examples cited from 1967 through 1969. Hence, Taft is accused of having upgraded its programming in contemplation of the Commission's review of its applications for renewal of license. We agree with petitioners that a licensee cannot rely on last-minute efforts to upgrade his programming, but rather must show that he has been responsive to community needs throughout the three-year license term. Should we find a pattern indicating that the licensee has failed to respond to community needs over a period of time, little weight will be given to belated improvement. *American Federation of Musicians* v. *F.C.C.*, 356 F. 2d 827 (D.C. Cir. 1966); *Community Broadcasting* v. *F.C.C.*, 363 F. 2d 971 (D.C. Cir. 1966); *South Florida Television Corp.* v. *F.C.C.*, 349 F. 2d 971 (D.C. Cir. 1965), *cert. den.* 382 U.S. 987 (1966); *Office of Communications of the United Church of Christ* v. *F.C.C.*, 359 F. 2d 994 (D.C. Cir. 1966). Here, however, we do not have a case of belated upgrading. First, we note that the renewal application calls for a showing of typical and illustrative programming devoted to matters of public importance during the year preceding the filing of the application. Accordingly, we will not discount the licensee's performance during that year, particularly in the absence of any facts which would indicate that the licensee was unresponsive to community problems

during the first two years of the license term. No information has been offered to indicate that Taft was unresponsive to community needs during this period; *i.e.*, petitioners have failed to make any specific allegations of fact about the licensee's service to meet community problems from 1967 to 1969 and, in the absence of such facts, no licensee will be required to cull over two years' records to prove the contrary. It should also be noted that programming is not static in nature. Thus, it is not unreasonable to expect that licensees will plan and design new programs throughout the license term, including the year preceding the filing of their renewal applications, to meet community problems. Again, such efforts will not be considered belated upgrading when no facts are presented which would indicate that the licensees were unresponsive to community problems during the initial portion of the license term.

62. Petitioners also complain that most of WTVN's regularly scheduled public affairs programming is broadcast on Sunday evenings, rather than during prime time commuting hours. We note that the Commission has not "attempted to dictate to broadcasters the types, formats and time periods during which non-entertainment programming should be carried"; that nevertheless, licensees do have an obligation to present some non-entertainment programming in prime time when a larger audience is available; but, that

> . . . licensees have discretion to schedule this type of programming in other hours when it may face less competition from the more broad-appeal entertainment programming available during [prime time]. Hence, the Commission has consistently called upon broadcasters to exercise their prudent judgment in determining the problems of the communities they are licensed to serve, and the amount, kind and time-periods during which non-entertainment programming should be presented to provide for those problems.

Time-Life Broadcast, Inc., 33 F.C.C. 2d 1081, 1092 (1972). A review of the renewal application and the pleadings before us reveals that WTVN presents news broadcasts during "drive time"; that "[a]pproximately 40 per cent of the entire news program time was devoted to local and regional news during the composite week" (Renewal Application, Exhibit IV–A–4); and that many of these news reports concerned matters of interest to blacks. Also, the licensee broadcast editorials and PSA's during the commuting hours, many of which related to black needs and interests. On the basis of this information, we find that the licensee has attempted to meet community problems with various types of programming which has been broadcast at different times and days throughout the week. Absent persuasive evidence to indicate that these efforts were necessarily ineffective, the Commission will not substitute its judgment for that of the licensee.

63. Petitioners also object to many of the editorial positions taken by Taft during the past license term. We note, however, that the Commission has held that overt licensee editorialization is not contrary to the public interest. *Editorializing by Broadcast Licensees*, *supra*. This conclusion was reached in recognition of the fact that the licensee's authority to determine the specific programs to be broadcast over his station gives him an opportunity, not available to other persons, to insure that his personal viewpoints are presented in his station's broad-

casts. Provided that the licensee's editorials are geared to serve the public interest rather than only his private interest, and provided that the station has complied with the fairness doctrine obligation to allow for the reasonable opportunity for the presentation of contrasting viewpoints, no questions will arise with regard to statements of particular opinions and views which are identified as those of the licensee. We have no information before us here to indicate that Taft has sought to serve only its private interests or that it has failed to comply with the fairness doctrine. With regard to this latter point, we wish to emphasize that the licensee is not required to meet his fairness doctrine obligation solely by presenting replies to his editorials.[7] Rather,

> [i]t should be recognized that there can be no one all embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view.

Editorializing by Broadcast Licensees, *supra* at 1251. Accordingly, the Commission will evaluate the reasonableness of the licensee's editorial policies only in the context of a review of his overall programming.

64. Petitioners' final objections to Taft's programming relate to the music broadcast by WTVN and WBUK. Essentially, petitioners allege that their personal tastes differ from Taft's and, as a result, request that the Commission intervene. As stated above, the Commission's review of a renewal applicant's performance focuses on the informational programming which he has offered to meet community problems. We have disdained consideration of entertainment formats in this context. In doing so, we have not ignored the fact that most radio stations follow specialized formats which, of necessity, do not each appeal to all segments of the community; that each station's entertainment presentations do not reflect all the various "life styles" that exist within the service area.[8] Nevertheless, we have framed our ascertainment and programming requirements only in terms of community problems. Our decision to proceed in this way has been upheld by the courts. *Stone* v. *F.C.C.*, *supra* at 20. We believe that what is involved here is simply licensee judgment as to a matter of entertainment taste, coming well within its very wide discretion to program its station.

EMPLOYMENT DISCRIMINATION

65. Petitioners allege that Taft has discriminated against blacks in its employment practices. To support this charge they state that of the 142 people employed by WTVN, WTVN-TV and WBUK(FM),

[7] We note that Taft does permit replies to its editorials. In this regard, we find nothing unreasonable about the conditions it imposes in determining whether to grant a request for time (par. 47, *supra*).

[8] We interpret the comments written on the WBUK record albums in light of these considerations. Rather than reflect any racial bias, they appear to refer to the licensee's preferences for a particular type of music or "sound". Further, we note that the licensee has presented on WTVN black performers whose music is consistent with the station's format (par. 39, *supra*).

only 8 are black; that the stations should employ at least 33 blacks; and that Taft has failed to actively recruit black applicants. As a result of Taft's alleged discrimination, it is submitted that blacks do not occupy "policy making positions" and that, accordingly, the stations cannot present programming to serve the needs of all residents, assure that "degrading programs" are not presented, and prevent the broadcast of "misleading news."

66. Taft responds to these allegations by first pointing out that petitioners apparently believe that 23 per cent of the licensee's service area is comprised of blacks. Taft states that the non-white population of the area served by WBUK(FM) (1 mv/m contour) is only 9.4 percent, that of the WTVN service area (2 mv/m contour), only 7.0 per cent and that of the WTVN–TV service area (Grade A contour) only 10.0 per cent (par. 9, *supra*). The licensee also refers to a letter written to the local chapter of the N.A.A.C.P. on June 29, 1970, in which the following information is recited:

> At present 14 black men and women are employed by WTVN–TV and Radio in non-custodial positions. Of the 14 men and women, five are on the air, four on television and one on radio. Three of the four television employees and the radio employee who are on the air appear regularly. The positions are as follows:
>
> 1 Television Traffic Assistant
> 2 Television Reporter-Newscasters
> 1 Television Intern News Reporter
> 1 Television News Courier
> 1 Television Public Affairs Assistant
> 1 Television Announcer
> 1 Television Floorman
> 1 Television Building Supervisor
> 1 Television Engineer-Technician
> 1 Television Salesman
> 1 Radio Printer
> 1 Radio Public Affairs Assistant
> 1 Radio Newsman

It is further stated that, as of the date of the filing of the opposition, October 14, 1970, the three stations had 134 employees, 17 of whom are black.

67. With regard to petitioners' allegation that Taft has failed to actively recruit black applicants, it is stated that the stations have consulted with the following organizations in an effort to hire blacks: the Broadcast Skills Bank, Urban Resources, the Columbus Urban League, the Ohio Employment Service, the National Alliance of Businessmen, and the Ohio State University School of Journalism.

68. In reply, petitioners contend that Taft has failed to prove that it has not discriminated against blacks in employment. First, it is stated that Taft relies on "outdated and inaccurate" census figures to justify the number of blacks employed by the three stations. Moreover, it is argued, even if the "most conservative" census figures are used, Taft should employ at least 27 blacks, not 17. Petitioners also take issue with the information (par. 66, *supra*) provided by Taft concerning those 17 employees. It is alleged that none of the black employees occupies policy-making positions. Also, questions are raised about the definitions of the job titles, when the employees were hired, how they were recruited, how many have been promoted, what

training programs have been provided for them, and how many have since left the station. With regard to this last point, petitioners allege that the Radio Newsman was a student, part-time employee who spent a summer in Mexico. Accordingly, they question "how frequently he was on the air in Columbus." In addition it is stated that the Radio Public Affairs Assistant, Miss Curtisha Martin, left WTVN after experiencing "a most unsatisfactory working relationship with the station." In an affidavit, Miss Martin states that she was harassed and treated with disrespect because she is black; that on two occasions station employees angrily and unnecessarily criticized her performance; that after the first incident she sought help from Mr. Waldo Taylor, Director of Urban Resources, and after the second, spoke to Mr. Victor E. Ferrall, Jr., Taft's Washington attorney; that she was twice reprimanded for "calling outside the station for help"; and that several days after the second reprimand the station demanded her resignation. Miss Martin complains that the employees who criticized her were never reprimanded "because [the station manager] thought it was all right to treat a Black person that way." She also states that the other employees at the station were rude and intolerant because they felt that blacks "deserved to be treated as inferior." She contends that the station dismissed her "for letting people outside the station know of internal racial discrimination." Miss Martin finally alleges that she did not write the WTVN *Radio Service Handbook* (par. 30, *supra*) and that the booklet constitutes an insult to the black community.

69. In addition to these specific complaints, petitioners also question the efforts made by Taft to recruit black employees, alleging that the licensee has substantiated only one consultation with one of the six agencies it allegedly contacts in its search for black applicants. The organization contacted, the Broadcast Skills Bank, is described as a "sham designed to gloss over the licensee's failure to actively recruit Black employees." Petitioners contend that the agency has not met more than once every six months since September 1969, and that no training program has ever been established. Further, petitioners state that since "so little positive has resulted from" the recruitment program, serious questions are raised concerning Taft's commitment to provide equal employment opportunity. "If the licensee were sincerely interested in serving the needs of the Black community, there would be an active recruitment campaign, headed by a Black and geared toward encouraging enlistment in training programs and hiring qualified Blacks for jobs with Taft stations."

70. With respect to the allegations made by Miss Martin, the licensee states the following: (i) during her term of employment her attendance record was poor as she frequently was absent and often arrived late or left early; (ii) the station employees did not abuse her, but rather encouraged her to participate in the operation of the station; (iii) Miss Martin not only wrote the *Handbook*, she also used it as an example of her work when she sought employment after leaving WTVN; and (iv) she was asked to resign after she refused to complete an assignment and, in the presence of two visitors to the station,

screamed and cursed at other employees. Finally Taft argues that Miss Martin's affidavits reveal "a single unhappy employee," not a pattern of discrimination warranting designation for hearing.

71. Petitioners reply that one specific allegation of discrimination in employment is sufficient to raise a substantial and material question about a licensee's employment practices. Further, it is argued that since (a) Taft has not established an affirmative training program and (b) only a minimal number of blacks are employed in non-menial positions, Commission action is warranted.

Conclusions

72. On June 4, 1969, the Commission adopted rules providing that licensees must afford equal opportunity in employment and that no person shall be discriminated against in employment because of race, color, religion, national origin or sex. *Nondiscrimination in Broadcast Employment Practices of Broadcast Licensees*, 18 F.C.C. 2d 240 (1969). Thereafter, by Report and Order, we adopted a rule requiring broadcast licensees and permittees to file an annual statistical report on their employment makeup (FCC Form 395), and broadcast applicants and licensees to prepare equal employment opportunity programs (Section VI of FCC Forms 301, 303, 309, 311, 315, 340, and 342).[9] We have stated that in order to challenge a licensee's equal employment program or show non-compliance with the Commission's rules, a petitioner must demonstrate with some degree of specificity that the licensee's employment practices in some way prevent equal employment opportunities or that the licensee discriminates in employment. *Time-Life Broadcast, Inc.*, 33 F.C.C. 2d 1050, 1059 (1972). We conclude that petitioners have failed to sustain that burden.

73. First, it appears that petitioners' allegations with regard to the number of blacks employed by Taft are incorrect (par. 65, *supra*). Similarly, petitioners' approximation of the number of blacks in Columbus is somewhat misleading when compared to 1970 Census data for the Columbus SMSA (par. 17 *supra*). Moreover, we have held that we not require the employment of minority members in direct proportion to that minority group's proportional strength in the community. *Universal Communications Corporation, Station WALA*, 27 F.C.C. 2d 1022, 1028 (1971). In this regard, we have stated that we do not believe that fair employment practices will necessarily result in the employment of any minority group in direct proportion to its number in the community. *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 23 F.C.C. 2d 430, 431. Accordingly, no question will be raised unless the proportion of minority employees compared to the proportion of that minority group's members in the service area population falls beyond "the zone of reasonableness." *Stone* v. *F.C.C.*, *supra*, *aff'd on rehearing* (September 1, 1972). Further, no questions are raised by the allegations concerning failure to employ blacks in policy-making positions since the licensee has shown that most of the black

[9] We did not require applicants and licensees to file Section VI's with applications filed prior to January 4, 1971. Accordingly, Taft did not submit Section VI's with the instant applications.

employees hold non-menial positions and some are in higher paying positions, *i.e.*, officials and managers—1, professionals—4, technicians—3 (1972 FCC Forms 395).

74. We disagree with petitioners' conclusions that the allegation of discrimination submitted by Miss Martin requires designation of the renewal applications for hearing. We have stated, in this regard, that not every complaint of an isolated action, even if substantial, will warrant deferring a renewal or designating an application for hearing. Rather, action will be warranted only where we find a pattern of substantial failure to accord equal employment opportunities. *Nondiscrimination Employment Practices of Broadcast Licensees*, 18 F.C.C. 2d 240, 241–2. Accordingly, even if accepted as true, this allegation standing alone does not establish a pattern of discrimination. Nor has any evidence been submitted to indicate that the licensee's employment practices serve as artificial barriers to equal employment. As evidence of the effectiveness of the affirmative efforts being made by the licensee to hire minority group persons, we note that the 1971 Annual Employment Report indicates that the three stations employed 147 persons, including 18 blacks (12.2 per cent), and that the 1972 report reveals that 146 persons were employed, 21 of whom are black (14.3 per cent).[10] In each year, only three of the black employees were service workers. On the basis of all the foregoing information, we conclude that the licensee has made reasonable efforts to provide for equal employment opportunities at the three Taft Columbus stations.

ADVERTISING POLICIES

75. Petitioners first urge that broadcast media in general should present more blacks in commercials and that a wider representation of blacks in middle class settings will help to eliminate the "undesirable stereotype of the Black that exists in the white community." With regard to the stations in this proceeding, petitioners complain that Taft's advertising policies are racist in that blacks are depicted in stereotyped middle or lower-middle class occupational roles; that blacks are not treated as the equal of whites "in work social interaction situations"; that Taft's commercials "portray a mono-ethnic image of the Columbus society"; and that Taft uses a disproportionate number of blacks in its commercials. Further, petitioners argue that "Black Americans respond favorably to products depending on the racial composition of the actors or models." Accordingly, petitioners contend that Taft discourages blacks from responding to commercials concerning "certain new housing developments, . . . country clubs, and resort travel."

76. The licensee responds to these allegations first by stating that most of the commercials broadcast by WTVN–TV are not produced by the station; that with respect to local commercial announcements, most of the copy and talent is provided by advertising agencies and the

[10] Contrary to the arguments made by petitioners, licensees are not required to establish training programs for minority group personnel. Nevertheless, we note that the 1972 FCC Form 395 discloses that the AM–FM combination and WTVN–TV each employ one on-the-job trainee.

station merely provides the taping facilities; and that when talent is provided by WTVN–TV, it is done without discrimination and on the basis of who is on duty at the time the announcement is made. In this latter regard, Taft states that WTVN–TV has three announcers, one full-time and two part-time. One of the part-time announcers is black and does commercial announcements.

77. As to petitioners' complaint that blacks are cast in stereo-typed roles, Taft states that "it is the subjective feeling of WTVN–TV personnel that the vast majority of all commercial announcements, Black or White, utilize stereo-typed middle class occupational roles." Also, with reference to these and other generalizations about television advertising made by petitioners, Taft argues that no factual basis is offered which would warrant denial of the stations' renewal applications.

78. In reply, petitioners contend that Taft has failed to refute the allegations made in the petition to deny. They reiterate their claim that a disproportionately small number of blacks are shown and that those who do appear are presented as middle and lower middle class citizens. Specifically, the petitioners cite a local commercial in which "[m]iddle aged white couples are urged to take" a motel management course. Having completed the course and become managers, a white couple is shown giving instructions to a black cleaning woman. A second commercial which allegedly degrade[s] Blacks and present[s] them in lower positions" is an American Airlines announcement in which the "sole Black is a stereo-typed 'Uncle Tom' skycap." Finally, petitioners complain about a series of commercials which, they claim, has been found "unacceptable" by the other commercial television stations in Columbus. It is stated that the ads are aimed at poor blacks, urging them to buy furniture on extended credit terms in order to receive a special gift, such as a stereo record player or pool table. The advertisers present "either an obese man, or a pair of obese twins saying 'Mama got two for one, and so can you!'"

79. Taft responds by noting that the obese man and obese twins appearing in the furniture commercial are white, not black; that any racism found in the other two commercials originates "in the eye of the beholder, not in the commercial itself," and that WTVN–TV presents commercials depicting blacks as executives, stewardesses, fashion models, etc., while others show whites as plumbers, dishwashers, etc.

Conclusions

80. We do not find petitioners arguments with respect to this issue to be persuasive. First, we note "that in recent years there has been an increasing appearance of minority group people on television, both in commercial matter and on other programs, and that those people represent many aspects of American society." *The Evening Star Broadcasting Co.*, 27 FCC 2d 316, 333 (1971), *aff'd sub nom. Stone* v. *F.C.C.*, *supra*. With respect to the alleged portrayal of blacks in "stereotyped" roles, we conclude that no action is warranted in the absence of evidence to indicate that the licensee has deliberately excluded commercials which depict blacks in other roles or accorded non-

blacks different, more positive treatment. Petitioners' general allegations and few examples are not sufficient to raise a question of fact regarding this matter. Further, the complaints about the furniture commercial series do not require action as petitioners fail to provide any information to show that the advertiser's appeals were false or misleading. Rather, we are only told that other stations have refused to carry the commercials and that, in petitioners' opinion, the commercials are degrading. With respect to the first point, we note the Commission is concerned with the individual performance of the licensee, not a comparison with his competitors. As to the second, petitioners have failed to indicate why blacks would be any more offended by this commercial than whites. Finally, overriding this entire issue is the fact that in determining whether to grant renewal of license our evaluation must be based on the licensee's overall performance. To reach a subjective judgment of the content of a few examples of advertising would, we believe, constitute the kind of censorship prohibited by Section 326 of the Communications Act.

CONCENTRATION OF CONTROLS

81. Petitioners allege that, since it is licensed to operate three stations in Cincinnati (WKRC, WKRC–TV and WKRC–FM) as well as the three Columbus stations, Taft enjoys "a regional dominance that allows them to exercise effective access to two Ohio cities' listening and view public." Petitioners contend that in view of Taft's "failure to allow diverse political and philosophical viewpoints to be disseminated, . . . some consideration should be given to the multiplicity of their broadcast holdings."

82. In opposition, the licensee observes that petitioners do not allege that Taft has engaged in any anti-competitive conduct. Also, it is stated that the Commission's multiple ownership rules are clear and that their application to Taft requires no comment.

83. Petitioners reply that while multiple ownership is being considered in a rulemaking proceeding, the Commission should nevertheless scrutinize the licensee's approach to ascertainment and programming in order to determine whether the First Amendment objective of the dissemination of information from the widest possible number of "diverse and antagonistic sources" is achieved. *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945). Petitioners contend that Taft has thwarted the achievement of this objective, first by conducting its ascertainment survey as a joint effort by all three Taft Columbus stations. Accordingly, it is stated that the three stations will be operating on the basis of the same information, precluding the presentation of diverse programming. Also, if any group is underrepresented in the community, that group's needs will not be met by any of the three stations. Second, it is alleged that, in addition to the "collusion" practiced in conducting the ascertainment survey, Taft stations share news gathering facilities and maintain a single editorial policy. Taft responds to this last allegation by stating that the radio and television news gathering facilities of Taft are entirely separate.

Conclusions

84. Taft's ownership of WTVN, WTVN–TV, and WBUK in Columbus and WKRC, WKRC–TV, and WKRC–FM in Cincinnati, is consistent with our multiple ownership rules (Sections 73.35, 73.240, 73.636). Absent allegations of specific abuses arising from such ownership, designation of a renewal application is not warranted. *Stone* v. *F. C. C.*, *supra*. Rather, we have approached the issues raised by multiple ownership in the context of rulemaking proceedings (First Report and Order, *Multiple Ownership of Standard, FM and TV Broadcast Stations*, 22 FCC 2d 306 (1970) and Further Notice of Proposed Rulemaking, *Multiple Ownership of Standard, FM and TV Broadcast Stations*, 22 FCC 2d 339 (1970)).[11] Petitioners seek to distinguish this proceeding by citing certain alleged abuses which, they claim, warrant designation of the renewal applications for hearing. We conclude, however, that these so-called abuses raise the kind of policy issues which we are considering in the rulemaking proceeding.[12]

85. In conclusion, on the basis of our review of the licensee's renewal applications and the matters discussed herein, we find that the Coalition has failed to raise substantial and material questions of fact which establish a *prima facie* case for denial of Taft's licenses. We also find that a grant of Taft's applications would serve the public interest, convenience and necessity.

86. Accordingly, IT IS ORDERED, That the petition to deny filed by the Columbus Broadcasting Coalition IS DENIED.

87. IT IS FURTHER ORDERED, That the above-captioned applications for renewal of licenses of WTVN, WTVN–TV, and WTVN–FM (formerly WBUK(FM)), Columbus, Ohio, ARE HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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[11] It is noted that in *Frontier Broadcasting Co.*, 21 FCC 2d 570 (1970), despite the absence of any allegations of specific abuses, we did designate for a hearing a renewal application in order to determine whether the licensee's broadcast interests and the other media under common control resulted in an undue concentration of control in the local community. We observe, however, that the circumstances present in *Frontier* included an "apparent lack of competition" (*Id.* at 573) and constituted "a most unique ownership case" (concurring statement of Chairman Dean Burch, *Id.* at 574). Under the facts here we are not confronted with an analagous situation.

[12] We note in this regard, however, that the *Primer* does not require a licensee to needlessly duplicate his ascertainment efforts by having each of his stations in the same market conduct separate surveys. Here especially, where management personnel from each station participated in the ascertainment process and where the programming proposed to meet the problems ascertained has been "fitted into the format" of each station (*Primer*, Question 34), no questions are raised by the licensee's survey.

F.C.C. 72R–390

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of THE UNITED STATES DEPARTMENT OF DEFENSE, COMPLAINANT *v.* GENERAL TELEPHONE COMPANY OF THE NORTHWEST, GENERAL TELEPHONE COMPANY OF CALIFORNIA, GENERAL TELEPHONE COMPANY OF WISCONSIN, GENERAL TELEPHONE COMPANY OF FLORIDA, WEST COAST TELEPHONE COMPANY OF CALIFORNIA, ST. JOSEPH TELEPHONE AND TELEGRAPH COMPANY, UNITED TELEPHONE COMPANY OF THE NORTHWEST, NEVADA TELEPHONE-TELEGRAPH COMPANY, DEFENDANTS AMERICAN TELEPHONE & TELEGRAPH COMPANY, RESPONDENT	Docket No. 18536

APPEARANCES

Curtis L. Wagner, Jr. and *Wolfgang Drescher*, on behalf of the Department of Defense; *William Malone*, on behalf of General Telephone and Electronics Service Corporation; *Daryal A. Myse*, on behalf of St. Joseph Telephone and Telegraph Company; and *Cecil O. Simpson*, on behalf of the Chief, Common Carrier Bureau, Federal Communications Commission.

DECISION

(Adopted December 18, 1972; Released January 2, 1973)

BY THE REVIEW BOARD: BERKEMEYER, PINCOCK, AND KESSLER.

1. This proceeding was initiated by a formal complaint filed by the United States Department of Defense (DOD) against General Telephone Company of the Northwest, General Telephone Company of California, General Telephone Company of Wisconsin, General Telephone Company of Florida, West Coast Telephone Company of California (all represented by General Telephone and Electronics Service Corporation (GTE)), and St. Joseph Telephone and Telegraph Company (St. J.), for issuance of a cease and desist order requiring the defendants to cease and desist from charging, collecting and receiving a greater or lesser or different compensation for dial restoration panel (DRP) equipment[1] than set forth in AT&T Tariff FCC No. 260 in

[1] United Telephone Company of the Northwest and Nevada Telephone-Telegraph Company, originally named as defendants, entered into joint agreements with the DOD whereby the tariffs for the DRP's are now filed with the Commission. The complaint as to these parties was dismissed by Commission Order, FCC 71–362, 28 FCC 2d 713, released April 13, 1971.

violation of Section 203(c) of the Communications Act of 1934, as amended.[2] The complaint also requested damages for alleged unlawful charges. By Memorandum Opinion and Order, FCC 70–255, 22 FCC 2d 70, released March 16, 1970, this proceeding was designated for hearing by the Commission under the following issues:[3]

> 1. Whether the furnishing of any of the dial restoration panel equipment and the circuits utilized relative thereto and charged for under intrastate tariffs constitute interstate or foreign communication within the meaning of the Act and, if so, whether the charges collected by defendants for the provision of said equipment under intrastate tariffs are unlawful pursuant to Section 203(c) of the Act.
>
> 2. Whether complainant is entitled to any damages as a result of any violation of Section 203(c) of the Act that may be found under the foregoing issue; and, if so, the amounts thereof.
>
> 3. Whether, in light of the evidence adduced pursuant to issue 1 above, the Commission should require AT&T to set forth the charges for the furnishing of DRP equipment and the classifications, practices, and regulations affecting such charges in its Tariff FCC No. 260 on behalf of the above-captioned defendants.[4]

2. On June 23, 1971, Administrative Law Judge Frederick W. Denniston released an Initial Decision (FCC 71D–35), ordering the defendants to "cease and desist from violations of Section 203(c) of the Act by charging or collecting any charges for DRP services or equipment other than in accord with AT&T Tariff FCC No. 260, or such other effective tariff as may properly be filed with this Commission under Section 203(a)."[5] The Presiding Judge concluded that the DRP is "a portion of a nationwide interstate special purpose communications system for national defense, designed and used for interstate communication service." With respect to the question of damages, the Judge held that since the tariffs under which the DRP are now filed are lower than the appropriate interstate tariff, no losses have been sus-

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[2] Section 203(c) reads in pertinent part as follows:

> No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation, for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect. . . .

"Such communication" is defined in Section 203(a) as follows:

> Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate or foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this Act when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges.

[3] The Commission designated the issues "without in anyway limiting the scope of this proceeding." 22 FCC 2d at 73. Nevertheless, the hearing did not go beyond the scope of the designated issues.

[4] The Commission made AT&T a party to the proceeding on the ground that:

> "If, after hearing, it is found that defendants while connecting carriers are providing interstate communications service, the Commission may order [AT&T] to file on behalf of defendants the charges and the classifications, practices, and regulations affecting such charges relative to said service." 22 FCC 2d at 73 n. 5. AT&T participated at the hearing but did not offer any evidence or witnesses.

[5] Section 203(a) of the Act provides for the filing of proper rate schedules with the Commission.

tained by DOD. Consequently, the complaint for damages was dismissed. As to the third issue, the Judge concluded that since AT&T has already published its charges for the DRP, no cease and desist order directed to it is required. The proceeding is now before the Review Board on exceptions filed by GTE, St. J. and the Common Carrier Bureau. We have reviewed the Initial Decision in light of these exceptions, the arguments of the parties,[6] and our examination of the record. Briefly stated, we agree with the Presiding Judge's ultimate recommendation that the charges for the DRP be filed with the Commission. On the whole, the Judge's findings of fact and conclusions of law on all of the issues adequately reflect the evidence of record. However, because of the complex and delicate nature of this proceeding, and in light of the exceptions to the Initial Decision, we believe a supplementary discussion of the issues is necessary. Therefore, except as modified herein and in the rulings on exceptions contained in the attached Appendix (Appendix A), the Presiding Judge's findings of fact and conclusions of law are adopted.[7]

FINDINGS OF FACT

Need for the dial restoration panel

3. The Dial Restoration Panel (DRP) is part of the SAGE/BUIC air defense system [8] that covers the continental United States, and portions of Canada. To properly fulfill its mission, which requires full-time interconnections, the system is interconnected through the AUTOVON [9] communications network of the Department of Defense. The complete system is identified as to the SAGE AUTOVON network. To achieve maximum flexibility and survivability when the essential services carried by the SAGE AUTOVON network are interrupted by disaster, enemy action or otherwise, and to initially set up the necessary interconnections, the Air Defense Command developed a device, the Dial Restoration Panel (DRP),[10] which permits quick manual restoration of interrupted circuits [11] and which is installed at control centers and sites within the Air Defense Command. The DRP operator utilizes the DRP equipment to restore interrupted

[6] Oral argument was held before a panel of the Review Board on June 27, 1972.

[7] No exceptions were directed to the Judge's conclusion regarding the question of damages or to his finding that no order need be directed to AT&T. As to damages, it is evident that since the charges under the present intrastate tariffs are lower than they would be if the charges were filed under interstate tariffs, damages are not appropriate. Since AT&T offered no evidence on issues 1 and 2 herein, and in view of our conclusions on those issues *infra*, we will not require AT&T to set forth charges as stated in issue 3. Therefore, these two matters will not be discussed further in this Decision.

[8] Within this system, SAGE (Semi-Automatic Ground Environment air defense systems network) has primary responsibility for air defense. Secondary responsibility for air defense is assigned to BUIC (Back-Up Interceptor Control), which was developed to serve as a back-up operation in the event that SAGE is disabled.

[9] AUTOVON (Automatic Voice Network), is a Department of Defense worldwide network for the transmission of voice, ground-to-air voice, teletype and data signals. SAGE/BUIC utilizes a portion of the network.

[10] The Dial Restoration Panel consists of: (1) access lines and jack circuits; (2) an attendant telephone and key circuit; and (3) a central office and PBX line and signal circuits. The DRP attendant can directly dial any other station within the SAGE AUTOVON network, whether located in another state or within the same state from which the call is made.

[11] In more detail, the DRP is used to establish (originally set-up) SAGE AUTOVON circuits, to re-establish (again establish circuits which have been disconnected, or to reconfigure existing circuits), and to restore circuits which have been interrupted due to various causes including disaster, enemy action or circuit difficulties.

SAGE/BUIC circuits by seizing an AUTOVON circuit used for a less vital service and using the seized circuit to reactivate the interrupted circuit (a form of pre-emption). The DRP also is used to establish, through the AUTOVON network, circuits connecting control center and radar sites within the Air Defense Command.

4. DRP's now are installed at sites throughout the nation.[12] The AUTOVON network connecting the sites is polygrid routed, *i.e.*, a message will be transmitted by way of the most direct route and, simultaneously, by two additional routes to insure that the message is received at the destination. Due to the polygrid routing, a message routed through a DRP in one state to a site within that state can travel through other states before reaching its destination. Although the PBX access lines to the DRP are primarily used for voice communications between various Air Defense Command (ADC) units, they can be seized by the DRP operator through use of the jacks, patch cords and switches on the DRP panel and employed as back-up to the Ground/Air and Data lines.

5. The Regional Control Center (RCC) for the 20th NORAD (North American Air Defense) Region located at Fort Lee, Virginia, has the capability to receive Data[13] via the SAGE AUTOVON network from locations in Virginia, Maryland, New Jersey, Pennsylvania, North Carolina, South Carolina, Florida and Georgia. In addition, Ground to Air communications[14] are available to most of these same locations. Site Z–198 at Tyndall Air Force Base, Florida, where the DRP is supplied by St. Joseph Telephone and Telegraph Company, is one of two BUIC NORAD Control Centers (BNCC) in the 20th NORAD Region, and functions primarily as a full time BUIC III NCC controlling a portion of the 20th NORAD Region.[15] Tyndall routes through its DRP Ground/Air, Data and PBX (Private Branch Exchange)[16] circuits which connect with AUTOVON switches lo-

[12] The DRP's supplied by defendants to complainant are located at the following sites:

Company	Site	Location
St. J	Z–198	Tyndall Air Force Base, Fla.
General Telephone Co. of the Northwest	Z–12	Near North Bend, Oreg.
General Telephone Co. of Wisconsin	Z–19	Near Antigo, Wis.
West Coast Telephone Co. of California	Z–33	Near Klamath, Calif.
General Telephone Co. of California	Z–39	San Pedro, Calif.
General Telephone Co. of Florida	Z–129	MacGill Air Force Base, Fla.

[13] Data transmissions include the transmission of telemetry data from the Long Range Radar (LRR) sites to the control center. There is continuous output through the DRP while the radar is operating.

[14] Ground to Air communications (designated in this proceeding as Ground/Air) are used to control military aircraft and for defense purposes.

[15] DOD Ex. 1, pp. 5–6, and Attachment B, p. 25.

[16] The more familiar PBX system is the private branch exchange in a hotel or industrial establishment. Thus, in a hotel, the guest uses the room telephone to communicate by way of the PBX system (either through the operator, or by dialing) with the registration desk. To place an outside call, the guest normally communicates with the hotel PBX operator who connects the guest to the outside telephone system. Such a PBX system normally would not have PBX lines between the hotel and distant locations. In contrast, this proceeding involves the use of PBX lines for on-site communications and for intrastate and interstate communications between the site and distant locations. For example, 4-wire PBX lines connect the North Bend, Oregon, DRP at site Z–12 with AUTOVON switches at Medford, Oregon, and Lodi, California, which connect with NORAD Control Centers at Keno AFS, Washington, and Othello AFS, Oregon, and with the Regional Control Center at McCord AFB, Washington. When not substituting for Ground/Air access lines, these 4-wire PBX lines are available for dial voice communications. As noted, *supra*, the

cated in Florida, Alabama and Georgia, from which emanate circuits which connect to other sites. The prime purpose of the DRP at Tyndall, as at other sites, is to establish and restore Data and Ground/Air services between the control centers within the region and ancillary sites. The Data and Ground-Air services, which satisfy a mission requirement, are not bound by state boundaries, and no single control center is within the same state boundaries as all of the ancillary units under its control. As a BNCC, Tyndall communicates with sites in Virginia, New Jersey, North and South Carolina and Florida, and forwards telemetry data to the 20th NORAD RCC at Fort Lee, Virginia.

ARGUMENTS OF THE PARTIES

6. The DOD's position is that the DRP is an interstate communications service subject to the Commission's jurisdiction. According to DOD, the DRP's should be tariffed entirely interstate. Both GTE and St. J. argue, however, that since the DRP is used for intrastate as well as for interstate communication it is used "for or in connection with" intrastate communication (Section 2(b)(1) of the Communications Act) and thereby excluded entirely from Commission jurisdiction. Defendants further assert that the DRP was always an integral device and comes with both interstate and intrastate equipment; therefore, defendants conclude, "splitting" the DRP into a sometimes interstate and sometimes intrastate facility is artificial and is inconsistent with the ease of tariff administration. Finally, they insist that the DRP is used for or in connection with a "telephone exchange service" which is beyond the scope of Commission jurisdiction. In addition, St. J. argues that it cannot be regulated by the Commission because it is a "connecting carrier".

7. While generally agreeing with the Presiding Judge's findings, the Common Carrier Bureau specifically takes exception to the Judge's ultimate conclusion that furnishing the DRP is wholly interstate in nature and entirely subject to the tariff filing provisions of the Communications Act. It argues that, pursuant to Commission precedent, the DRP should be tariffed according to its relative interstate-intrastate use. Neither customer determination of the relative proportions of use in interstate and intrastate communications, nor the difficulty in determining such relative use, asserts the Bureau, defeats the normal analytical process of deciding jurisdiction.

LEGAL PRECEDENT

8. This proceeding presents a legal question not unique in the Commission's history, *i.e.*, whether and to what extent the FCC possesses jurisdiction over equipment used in both interstate and

main purpose of the 4-wire PBX lines is for coordination of the tactical PBX lines and for circuit restoration of disrupted SAGE circuits between the Regional Control Center, the Back-Up Interceptor Control, and the Long Range Radar Center. In addition, North Bend has 2-wire local PBX lines which have the primary purpose of coordination with the control center, *i.e.*, for a person at the control center or the net control to orally coordinate with the DRP operator without disturbing the DRP 4-wire lines—which are needed for circuit restoration. The 2-wire lines cannot be used for back-up (such as restoration) of the 4-wire lines. The local 2-wire PBX lines can be used for on-base communications.

intrastate communications. One of the earlier Commission cases relating to this question was *Use of Recording Devices*, 11 FCC 1033 (1947), which concerned a Commission investigation into the use of recording devices in connection with interstate and foreign message toll telephone service and facilities. When the proceeding was initiated, certain telephone companies prohibited the attachment of any devices not furnished or authorized by the particular telephone company. The major focus of the telephone companies' argument (citing Sections 2(b)(1) and 221(b) of the Communications Act) was to the effect that the Commission has no jurisdiction to regulate the use of such devices because: (1) telephone calls are largely intrastate; (2) the intrastate and interstate calls are commingled; and (3) any regulation of the recorders in interstate toll service would necessarily regulate their use in intrastate toll and exchange service as well. The Commission's holding that it had jurisdiction rested primarily on the fact that because it was to be required that the user be able to physically disconnect or turn off the recording device, there was no reason why such a device must be used in connection with an intrastate call, thus leaving regulation of intrastate use with the appropriate state and local regulatory authorities. The Commission did comment further regarding its basic jurisdiction, however. Thus, the telephone companies' argument was rejected because it ignored the "real consideration" arising from the fact that interstate and foreign message toll telephone service "necessarily involves all the facilities, charges, classifications, practices, services, and regulations used in the rendition of the service, and regulation of such service must be able to deal with all or any of the matters so involved if it is to be effective." 11 FCC at 1047. Thus, *Use of Recording Devices* was a clear indication the Commission was not going to be diverted from the regulation of interstate communication by the "contamination theory" argument [17] on which the defendants here are relying.

9. Next, in *Katz* v. *AT&T*, 8 RR 919 (1953), and *Jordaphone Corp. of America* v. *AT&T*, 18 FCC 644 (1954), which dealt with regulation of the telephone, the Commission reiterated its authority over facilities used in interstate and intrastate communication. In *Katz*, the Commission stated:

> The fact that the same instruments are used for both interstate and intrastate services and that intrastate service is subject to state and local regulation does not alter the Commission's duties and obligations with respect to interstate telephone facilities. Were the Commission to exercise its jurisdiction only where the telephone facilities in question were exclusively interstate in character, it would result in virtually complete abdication from the field of telephone regulation by the Commission. Indeed, the telephone companies have previously advanced the argument that the Commission should leave regulation to the states where both interstate and intrastate telephone facilities were involved, and the Commission flatly rejected that proposal. [Citation omitted.] 8 RR at 923.

In *Jordaphone*, the Commission rejected the contention that it was without authority to entertain a complaint relating to regulation of customer-owned automatic answering devices. It stated:

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[17] The "contamination theory" contemplates that a service or facility used only partially for intrastate communication is not subject to Commission jurisdiction. As the Presiding Judge put it, "under [the theory] any equipment on which is terminated any line which is part of the local exchange service would apparently be classified as intrastate." Paragraph 33 of the Initial Decision.

Despite the fact that the individual telephone installation is used more extensively for intrastate telephone communications than for interstate and foreign toll telephone service, it is clear that this Commission, pursuant to Sections 1 and 2(a) of the Communications Act of 1934, as amended (47 U.S.C. 151, 192(a)), has jurisdiction insofar as the 1.2 percent interstate and foreign toll message calls are concerned. This 1.2 percent amounted to some 500 million telephone calls in 1950. 18 FCC at 670.

However, the Commission also held:

While we do not doubt the jurisdiction of this Commission to regulate the use of these devices in interstate communications in any case in which the record shows a need for such regulation, we hesitate to exercise our jurisdiction in a manner which might in effect preclude the independent exercise of jurisdiction by local regulatory agencies over the more extensive use of such devices, unless the record reveals a very clear need for such action so far as interstate telephone service is concerned. 18 FCC at 670.

Ultimately, the Commission exercised its jurisdiction over the tariff regulations insofar as they applied to interstate service, but did not require the defendants to permit the use of such devices in interstate service unless their use with respect to intrastate and exchange service had been authorized by appropriate state or local authorities.

10. In *American Telephone & Telegraph Co.—TWX*, 38 FCC 1127, 5 RR 2d 425, the Commission was presented with the question of whether station and supplemental equipment furnished in connection with teletypewriter exchange service should be charged for under tariffs filed with the Commission. The issues included an inquiry into:

(1) Whether it is practicable to establish separate interstate and intrastate schedules of charges for items of station and supplemental equipment used in furnishing teletypewriter exchange service;

(2) If it would not be practicable to establish separate interstate and intrastate schedules of charges, whether the single schedule of charges for such equipment should be filed with the Commission in accordance with the provisions of section 203 of the Communications Act of 1934.

While the teletypewriter service was not used exclusively interstate, the Commission assumed jurisdiction over this equipment. Citing *Jordaphone Corp. of America* v. *AT&T*, and *Use of Recording Devices*, *supra*, the Commission held:

We find nothing in Section 2(b)(1) which imposes any limitation upon our full authority over interstate communication service. For us to conclude that, because the facilities or instrumentalities are used in intrastate as well as interstate communications service, we do not have jurisdiction, or that we should not exercise it, would leave a substantial portion of the interstate communication service unregulated. We do not believe Congress so intended. [Citations omitted.] 38 FCC at 1133, 5 RR 2d at 432.

Responding to an argument that it could forbear exercising jurisdiction to require the filing of schedules of charges from items of station and supplemental equipment by virtue of the "unless otherwise provided by or under authority of this Act" clause appearing in Section 203(c), the Commission held that this language constituted no basis for relieving a carrier of the requirement to file schedules of charges for interstate communications services. The discussion concluded with this statement: "Moreover, even if we were not bound by the statutory

requirement, sound regulatory policy requires that charges for a service such as TWX, which is so predominantly interstate in its use, should be contained in tariffs on file with this Commission." 38 FCC at 1133. One of the parties in the *TWX* case argued that TWX service should be treated as "telephone exchange service" under Section 3(r) of the Act. The Commission rejected the carriers' contention that the TWX equipment (a teletype service) was a telephone exchange service. The Commission held that not only does the TWX service by itself fail to come within the definition of telephone exchange service, but the fact that TWX service in some aspects makes use of exchange facilities in common with telephone exchange services does not thereby convert TWX service into a telephone exchange service. The Commission further pointed out substantial material differences between the tariff rate structure applicable to interstate message toll telephone service and the service in question; the Commission emphasized that the interstate tariff for message toll telephone service provides that the toll service charge specified in the tariff include payment for all service furnished between the calling and called telephones which includes the interstate use of all station or terminal equipment. However, concerning the TWX tariffs, the per message charges did not purport to cover the charges to the user for the interstate use of the station equipment, which is a separate chargeable unit of interstate service.

11. Therefore, under the circumstances presented, in the *TWX* case it was concluded that the carriers were required to file charges for whatever services and facilities are offered for use for and in connection with its interstate teletypewriter exchange service. Moreover, since the carriers had argued that it was impracticable to establish separate interstate and intrastate charges for the station and supplemental equipment used in furnishing the TWX, the carriers were required to file *all* charges under interstate tariffs.

12. In *General Telephone Company of California*, 13 FCC 2d 448, 13 RR 2d 667, reconsideration denied 14 FCC 2d 695, 14 RR 2d 343 (1968), affirmed 134 U.S. App. D.C. 116, 413 F. 2d 390, 16 RR 2d 2001 (1969), cert. denied 396 U.S. 888 (1970), the Commission reiterated its jurisdictional authority. This case presented the question of whether the Commission had jurisdiction over telephone companies which supplied equipment to CATV systems whose facilities were located solely within one state but were used to bring in television signals originating outside the state. In *General Telephone*, no physical facilities of the common carrier crossed state boundaries. However, the Commission held that:

> The controlling facts here are that the cable facilities furnished by the telephone companies are links in the continuous transmission of the signals from the point of origin to the set of the viewer, and the intelligence received by the viewer is essentially the same as that transmitted by the broadcaster. Irrespective of the location of its physical facilities, the common carrier which thus participates as a link in the relay of television signals is performing an interstate communications service. 13 FCC 2d at 455, 13 RR 2d at 675. [Citations omitted.]

The Commission added that the primary concern of Congress was with the channel of communication rather than merely with the wires and cables, *i.e.*, the equipment used to establish the channel. Thus, the most

important aspect of the case was that the common carrier facilities were a part of an interstate channel of communication. Irrespective of the location of the physical facilities, the common carrier participated in the continuous transmission of signals from the point of origin to the viewer and served as a link in the relay of television signals which is an interstate communication service. See also *Idaho Microwave, Inc.* v. *FCC*, 122 U.S. App. D.C. 253, 352, F. 2d 729, 6 RR 2d 2004 (1965); and *Ward* v. *Northern Ohio Telephone Co.*, 300 F. 2d 816, 23 RR 2031 (6th Cir.), cert. denied 371 U.S. 820 (1962). *Cf. California Interstate Telephone Co.* v. *FCC*, 117 U.S. App. D.C. 255, 328 F. 2d 556 (1964). The Commission rejected the carrier's argument that its facilities were a telephone exchange service, noting, among other things, that the service did not require an exchange, did not go through an exchange, and was totally unrelated to the exchange charge.

13. The Court of Appeals, in affirming Commission jurisdiction over the telephone companies' facilities, stressed the importance of fulfilling the Act's broad purposes and objectives to develop a comprehensive, pervasive regulatory scheme where the Commission's powers would not be artificially fragmented or compartmentalized. The Act, the Court stated, must be construed in light of the needs for comprehensive regulation and the practical difficulties inherent in state-by-state regulation of parts of an organic whole. The Court found that the telephone companies had inserted themselves as links in the *indivisible* dissemination system which forms an interstate channel of communication, and, accordingly, had become a part of the interstate broadcast transmission. In addition, the Court concluded, the alternative to Commission regulation would prevent it from employing regulatory devices which directly affect operations already subject to regulation.

14. In *U.S.* v. *Southwestern Cable Co.* 392 U.S. 157 (1968), the Supreme Court affirmed this theory of expansive Commission jurisdiction.[18] Holding that the Commission had power to regulate CATV even where the intercepted television signals emanated from stations located within the same state in which the CATV system operates, the Court stated:

> To categorize respondents' activities as intrastate would disregard the character of the television industry, and serve merely to prevent *the national regulation that 'is not only appropriate but essential* to the efficient use of radio facilities.' [Citation omitted.] 392 U.S. at 169. [Emphasis added.]

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[18] Even though, as argued by GTE, the Court in *Southwestern* relied on the Commission's Title III jurisdiction and not on Title II, the important aspect of the case is that the Court affirmed Commission jurisdiction in very broad language in order that it be capable of thoroughly regulating communications throughout the United States. It is noteworthy that an argument similar to GTE's was rejected by the Commission in the *General Telephone* case, *supra*, where it was stated:

> On behalf of the carriers, it is urged that judicial decisions upholding Commission action taken pursuant to Title III of the Act are inapposite since the Commission's common carrier jurisdiction under Title II, which is involved in this proceeding, is not co-extensive with its licensing powers under Title III. . . . It may be, as claimed, that our prior determinations and the authorities relied upon are not dispositive of the issues now before us. Nevertheless, such issues must be resolved on the basis of the statutory scheme of the Act as a whole, and in a manner which will achieve the overall objectives of the Act. [Citations omitted.] 13 FCC 2d at 455–56, 13 RR 2d at 676.

In 1970, in the unreported *COPAN* case [19] in Docket No. 18031, the Commission reiterated the well-established principle that ". . . where equipment is used by a customer for both interstate and intrastate communications, the Commission has jurisdiction over the provision of that equipment to the extent that it is used for interstate communications." *Department of Defense* v. *AT&T*, FCC 70-1057, released October 6, 1970. (A copy of the Commission's Memorandum Opinion and Order is attached hereto as Appendix B.) *COPAN* involved a complaint filed by the DOD against AT&T, Hawaiian Telephone Company (Hawaiian), and other communications common carriers, seeking an order requiring Hawaiian to publish its rates for the use of COPAN under interstate tariffs. Hawaiian conceded that its facilities provided both interstate and intrastate communication services, but contended that certain portions of the facilities, namely, the terminal equipment, were intrastate and not subject to the Commission's jurisdiction. Hawaiian had filed schedules of charges for interstate services furnished through such equipment but argued that since it was providing a capability within Hawaii, the facilities themselves constituted an "exchange service",[20] thereby falling within the exclusion of Section 221(b).[21] The Commission disagreed with Hawaiian's interpretation of the statute. It concluded:

> **The fact that a *capability* is provided by Hawaiian to DOD for communication between stations located wholly within Hawaii does not mean that the facilities in question are intrastate and not subject to our jurisdiction. To the contrary, the undisputed facts on the pleadings are that the networks are used for interstate service over which the Commission has jurisdiction under Section 2(a) of the Act. The Commission has held in many cases that, where equipment is used by a customer for both interstate and intrastate communications, the Commission has jurisdiction over the provision of that equipment to the extent that it is used for interstate communications. [Citations omitted.] We conclude therefore that Hawaiian Telephone Company is required under Section 203 of the Act to file appropriate tariff schedules with the Commission for the interstate use of the equipment in question.**

Thus, *COPAN* clearly reaffirms the proposition that a common carrier cannot escape the Commission's jurisdiction by establishing that some of the communications carried on the facilities are intrastate.

15. *Southwestern Bell Telephone Co.* v. *U.S.*, 45 F. Supp. 403 (W.D. Mo. 1942), reversing *Southwestern Bell Telephone Co.*, 8 FCC 544 (1941), illustrates the limited extent of the exemption to Commission jurisdiction specified in Section 221(b) of the Act in situations where the facilities of an exchange service cross state boundaries. There,

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[19] COPAN refers to the "Command Post Alerting Network." While the opinion has not been published, all parties are aware of it, have cited and referred to it in their pleadings, and have raised no objection to its use. In any event, the *COPAN* opinion is a reiteration of previously published Commission rulings.

[20] A telephone exchange service is defined by Section 3(r) of the Act as follows:
'Telephone exchange service' means service within a telephone exchange, or within a connected system of the telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange and which is covered by the exchange service charge.

[21] Section 221(b) reads as follows:
Subject to the provisions of section 301, nothing in this Act shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

the Court held that the telephone exchange service located in Kansas City, Kansas, and Kansas City, Missouri, did not fall within the Commission's jurisdiction since the service was essentially local in nature.

JURISDICTIONAL AUTHORITY TO REGULATE THE CHARGES FOR THE DRP

16. The Review Board agrees with the Administrative Law Judge that the charges for the DRP should be filed with the Commission. DOD has successfully shown that the DRP is a portion of the Air Force's nationwide air defense system which was developed to provide the Air Force with the capability of interconnecting the entire air defense system for the United States; essentially, this is an interstate communications network, even though there are instances in which circuits operate entirely within a single state. The communications handled over the system with the assistance of the DRP facilities are primarily related to this interstate, national defense purpose. Thus, a single unified regulation pattern is highly desirable, if not essential. In our opinion, defendant's arguments that regulation can only be intrastate are unpersuasive and unsupported by precedent or by the provisions of the Communications Act.

17. The carriers rely in the main on two exceptions in the Act to the Commission's jurisdiction (*i.e.*, Sections 2(b)(1) and 221(b)). It is well established that provisos and exceptions in statutes are "strictly construed". *Rochester Telephone Corporation* v. *U.S.*, 23 F. Supp. 634, 636 (1938), affirmed 307 U.S. 125 (1939). In our view, the defendants have failed to establish that the DRP facility comes within any of the exceptions enumerated in the Act.

18. Both GTE and St. J. place major emphasis on the wording of Section 2(b)(1) which says that "nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges . . . [and] facilities . . . for or in connection with intrastate communication service. . . ." [22] This language, argue defendants, means that a service or facility used in part for intrastate communication is not subject to Commission jurisdiction; in other words, that it is "contaminated" by intrastate service. This theory, however, has been rejected on numerous occasions, as the cases cited earlier have demonstrated. The Commission always looks to the nature of the service being performed when judging whether it is subject to interstate regulation.

19. Defendants' attempt to draw an analogy between the DRP and the telephone set which, although used in interstate communication, is still tariffed intrastate, cannot be accepted. The nature of the service performed by the DRP is different in essential respects from that performed by the ordinary telephone set. In *General Telephone Co. of California*, *supra*, the Commission explained, in giving its interpretation of Section 2(b)(2), that it was the Congressional intent that,

[22] The relevant portion of Section 2(b)(1) reads as follows:
Subject to the provisions of section 301, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier.

. . . telephone facilities should remain under State regulation, *primarily* because they [are] *essentially local* but also to avoid an unnecessary burden to the Commission and the small independent companies. [Citations omitted.] 14 FCC 2d at 696, 14 RR 2d at 345. [Emphasis added.] [23]

The DRP is not "essentially local" in nature. It was devised to assist the DOD in its function of connecting the entire nation in a communication network for *national* defense purposes; it is basically and primarily interstate in nature and purpose and its local or intrastate functions are clearly secondary. St. J.'s assertion that the DRP has "substantial and important" local capabilities is simply unsupported by the record evidence. The DRP would not exist but for the broader, interstate communications purposes it serves to facilitate. Second, while defendants argue that it would be technically and practically difficult to "split" the DRP, they failed to show that filing under interstate tariffs would be an "unnecessary burden" to either the carriers or the Commission. In fact, other carriers already file their charges for the DRP with the Commission,[24] and local equipment is charged under appropriate intrastate tariffs.

20. In regard to Section 2(b)(1), we also find unpersuasive GTE's reliance on *Connecticut Light and Power Company* v. *FPC*, 324 U.S. 515 (1945), where, GTE contends, the Supreme Court interpreted language similar to Section 2(b)(1) as it affected the jurisdiction of the Federal Power Commission. Not only are there significant differences in the statutory language and in the nature of the service being regulated, but also it is absolutely clear that the DRP is not being used for the limited, local distribution, intrastate purposes that characterized the service in that case.

21. Next, the carriers' argument that Section 221(b) prohibits the Commission from assuming jurisdiction over the DRP is equally invalid. Section 221(b) proscribes Commission regulation of facilities used "for or in connection with" a telephone exchange service [25] even though a portion of such service constitutes interstate communication where such matters are subject to regulation by a state commission. Defendants assert that the DRP is connected as an extension of the local PBX and is therefore used "in connection with a telephone exchange service". However, GTE concedes that if the Board concludes that the DRP is separate and independent from the PBX equipment, then it would "fall beyond the reach of the 'for or in connection with' phrascology of Section 221(b)." The Board so concludes.

22. Even if it is assumed that the local base PBX equipment constitutes a part of telephone exchange service as referred to in the Act, the DRP cannot be treated as a part of it. The local PBX extensions were added to the DRP for convenience and ease of operation and are, at best, of secondary importance to the entire DRP and are not a primary part of the DRP operations. As stated by GTE witness John W. McNamara,[26] the primary purpose of the DRP is

[23] In *General Telephone*, the Commission was distinguishing the local telephone facility from the CATV facility. 14 FCC 2d at 697, 14 RR 2d at 345.
[24] See note 1, *supra*.
[25] For a definition of telephone exchange service, see note 20, *supra*.
[26] McNamara is the Government Service Engineer in the Planning Section of the Chief Engineers Department, General Telephone Company of the Northwest.

reconfiguration and all of its other characteristics and capabilities are secondary. In addition, St. J.'s witness, Bernard A. Pridgeon, Jr.,[27] testified that the DRP has capabilities which a multi-line telephone does not. Furthermore, the DRP itself is not connected to the telephone company exchange or message toll network and cannot perform such functions as incoming priority diversion or operator assistance. Moreover, the local 2-wire PBX extension lines available at the DRP cannot be used for back-up purposes. Therefore, in our view, the physical location of the local PBX lines on the DRP frame is for convenience and efficiency in oral coordination which could be affected just as well if the 2-wire local PBX telephone set was located on an adjacent table or stand. While it is not entirely clear, St. J. appears to be arguing that the DRP itself is a telephone exchange service. However, it cites no support for this theory nor does it indicate how the DRP fits into the statutory definition of a telephone exchange service. The decisive factor is the nature and purpose of the equipment and the character of the communications processed and not the carrier's self-serving classification. *General Telephone Co. of Calif., supra*, 13 FCC 2d at 461, 13 RR 2d at 681. As pointed out in our discussion above (see paragraph 19, *supra*), Congress was concerned with permitting state regulation where an exchange service extends across state boundaries but is essentially local in nature. The DRP does not fit this definition.[28]

23. Finally, we turn to St. J.'s argument that as a connecting carrier, Section 203(a) does not require it to file tariffs with the FCC and that it cannot be prevented from charging for DRP usage without a tariff being on file because the charges it makes for such service are independent of the charge it makes for SAGE AUTOVON service. It asserts that because no through routes having been established for DRP service, the requirements of Section 203(c) do not apply to St. J. While St. J. is correct in contending it is not required to "file" tariffs with this Commission, the Board cannot agree with the balance of its argument. By definition, "communication" includes "all instrumentalities, facilities, apparatus, and services" which are "incidental" to a transmission, and where the transmissions in question are interstate, such instrumentalities, etc., are a part of interstate communication. (See Section 3 of the Act.) The DRP's supplied by St. J. are "incidental" to transmissions made by DOD on the SAGE AUTOVON system, and when these transmissions are interstate, as many of them concededly are, the DRP becomes a part of interstate communication, whether or not it is also used incidentally for intrastate communications, as well. The question, then, is whether St. J. can escape the implications of the foregoing by excluding the DRP's from the equipment for which charges are made under through routes established between it and other carriers, such as AT&T, and by treating the DRP's as a part of their local exchange services. If the first of these approaches

[27] Pridgeon is the Commercial and Traffic Manager for St. J.

[28] St. J., in its exceptions and at oral argument, appears to imply that since Florida is now regulating the DRP, this equipment consequently falls within the provision of Section 221(b) which proscribes Commission jurisdiction over exchange service where such matters are subject to state regulation. This entirely unsupported argument would mean that since St. J. first filed tariffs with the Florida State Commission, the Commission is precluded from exercising its statutory authority. This argument clearly must be rejected.

were to prevail, the regulation intended to be achieved by application of Section 203 of the Act would be largely undermined.[29] We can find no justification for adopting such an interpretation in view of the clear language of Section 3 heretofore referred to. Similarly, St. J. is not justified in escaping Commission jurisdiction by classifying the DRP's as part of its local exchanges for the reasons we have discussed herein. Finally, the arguments made here by St. J. are essentially similar to arguments considered and rejected by the Commission in *AT&T–TWX*, *supra*, 38 FCC at 1130, 5 RR 2d at 429.

Conclusions

24. It has been established that the SAGE AUTOVON system is a specialized, nationwide defense communications system in which interstate communications play a major part but in which some of the communications links may, from time-to-time, be wholly within one state. The DRP was designed to facilitate the operation of this interstate, nationwide defense communications system, and it exists for this purpose primarily. Therefore, it is a facility or apparatus incidental to interstate transmission and constitutes interstate communication under the Act. The DRP is not a telephone exchange service or part thereof, as that term has been defined in the Act and interpreted by the Commission and the courts. Moreover, the basic nature and purpose, or character, of the DRP is not altered by the addition or inclusion of extensions or equipment that are part of the regular base or local exchange service supplied by the defendants and which is not a part of the SAGE AUTOVON network or System. This is equipment which could be located elsewhere but is attached to the DRP for convenience. Excluding the latter equipment, the defendants are required to comply with the provisions of Section 203 of the Act and the collection of any charges for the provision of DRP equipment and service under intrastate tariffs is unlawful.

25. While the Bureau urged adoption of the relative charge approach used by the Commission in *COPAN*, *supra*, neither party attempted at the hearing to either produce evidence which demonstrates the amount of interstate versus intrastate use or to even show that such a splitting of the DRP could practically take place.[30] In fact, in their briefs, and again at oral argument before the Board, both GTE and St. J. stressed the impracticability of determining relative use. Therefore, in view of the *AT&T–TWX* decision, *supra*, where the Commission held that certain equipment would be charged under interstate rates because it was technically impossible to determine the relative use, and the fact that the DRP is used extensively in interstate communication, we conclude that the DRP and all equipment connected with the DRP and used in the AUTOVON system must be tariffed under charges filed with the Commission, rather than according to its relative interstate-intrastate use.

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[29] See also *In the Matter of Mrs. Martha Tranquilli*, FCC 72R–346, released November 29, 1972, — FCC 2d —, 25 RR 2d 1060, for a recent discussion of Section 203 of the Act.

[30] In *COPAN*, there was no indication that it would have been impractical to separate intrastate from interstate traffic in order to bill it separately.

26. ACCORDINGLY, IT IS ORDERED, That General Telephone Company of the Northwest, General Telephone Company of California, General Telephone Company of Wisconsin, General Telephone Company of Florida, West Coast Telephone Company of California, and St. Joseph Telephone and Telegraph Company shall, within two days of the effective date of this Decision, CEASE AND DESIST from violations of Section 203(c) of the Communications Act of 1934, as amended, by charging or collecting any charges for DRP services or equipment other than in accordance with AT&T Tariff FCC No. 260, or such other effective tariff as may properly be filed with this Commission under Section 203(a) of the Communications Act; and

27. IT IS FURTHER ORDERED, That the claim of the Department of Defense for monetary damages IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
DONALD J. BERKEMEYER, *Member, Review Board.*

APPENDIX "A"

RULINGS ON EXCEPTIONS OF GENERAL TELEPHONE & ELECTRONICS SERVICE CORPORATION

Exception No.	*Ruling*
1	*Granted* to the extent that the GTE defendants are connecting carriers; *denied* in all other respects because all the GTE defendants are fully subject to the provisions of the Communications Act of 1934, as amended.
2	*Denied.* Paragraphs 10–22 of the findings of fact in the Initial Decision adequately describe the pertinent facts concerning the DRP. Paragraph 22 describes the use of common circuitry for the two- and four-wire capabilities.
3	*Denied.* The findings of fact in the Initial Decision adequately describe the DRP. Discussion of what would happen if the DRP were deleted is speculative and irrelevant since such action is not in issue; furthermore, it is not proposed.
4	*Denied* as not supported by the cited references. In addition, paragraph 22 of the findings of fact adequately describes the use of common circuitry.
5	*Denied.* The primary purpose and use of the DRP is in a national defense network requiring interstate communications and the record does not indicate that the Air Force would operate the DRP on any other basis.
6	*Denied.* Periodic re-homing of circuits appearing on the DRP is performed for technical and military reasons and in no manner alters the basic nature of the DRP.
7	*Granted* to the extent indicated in footnote 16 of this Decision; *denied* in all other respects because the proposed additional findings would add nothing of decisional value to the resolution of the issues.
8, 15	*Denied* as being without decisional significance.
9	*Denied.* See paragraph 25 of this Decision.
10	*Granted* to the extent that at some sites, such as where constant communication is required to satisfy a contract within the SAGE AUTOVON network, the DRP operator can dial that contractor; *denied* in all other respects as being without decisional significance.

Exception No.	*Ruling*
11	*Denied.* Exceptor does not question the accuracy or point out an error in the sentence excepted to. See Section 1.277(a) of the Commission's Rules.
12	*Denied* as being without factual support and of no decisional significance.
13, 14, 16, 17	*Denied.* These exceptions are essentially directed to GTE's misplaced reliance on the "contamination theory", and, as fully explored throughout the Decision, this theory has never been accepted by the Commission. See, *e.g.*, paragraphs 7–13 and 18–20 of this Decision.
18	*Denied.* Neither the Initial Decision of the Administrative Law Judge nor our Decision is based on "the preference of the customer, the purpose of the customer, or the customer's contracting convenience." Both Decisions are based on legal precedent and statutory interpretation.
19	*Denied.* We have concluded that the DRP is not tariffable under both interstate and intrastate tariffs. See paragraphs 24 and 25 of this Decision.
20	*Denied.* See paragraphs 21 and 22 of this Decision.
21	*Denied.* See paragraph 23 of this Decision.
22, 28, 30	*Denied* for the reasons stated in the whole of this Decision.
23, 24, 25, 26, 27	*Denied.* The propriety of entertaining this complaint was fully discussed by the Commission in the designation Order, 22 FCC 2d 70, released March 16, 1970, and no evidence has been presented which would constrain the Board to reconsider these matters.
29	*Denied.* GTE's request is procedurally defective. GTE has neither formally claimed recoupment of past undercharges nor produced any evidence to document this claim.

RULINGS ON EXCEPTIONS OF ST. JOSEPH TELEPHONE AND TELEGRAPH COMPANY

1	*Denied.* The Initial Decision adequately and accurately reflects the record evidence.
2	*Granted* to the extent indicated in paragraph 5 of this Decision; *denied* in all other respects as proposing findings which appear in substance in the findings of fact in the Initial Decision, or which are without decisional significance.
3	*Denied.* The Judge's finding is accurate. Furthermore, St. J. has presented no evidence establishing that the AUTOVON circuits connected to the DRP at Tyndall AFB, or elsewhere, are considered intrastate in nature for tariff purposes.
4	*Denied.* The testimony establishes that within the limitations set forth by the Judge in his findings of fact (see Tr. 303), there is an analogy between a toll test board and the DRP.
5	*Denied* as being without decisional significance.
6	*Denied.* Except for those portions of the requested finding which appear in paragraphs 1–4 of the Initial Decision, the requested findings lack decisional significance.
7	*Denied.* See the discussion of St. J.'s position at paragraph 23 of this Decision.
8	*Denied* as being wholly argumentative.
9, 10, 12	*Granted* to the extent that the Board recognizes the bases for St. J.'s arguments; *denied* in all other respects because the exceptions are argumentative.

Exception No.	*Ruling*
11	*Denied.* See paragraphs 21 and 22 of this Decision.
13	*Denied.* See paragraphs 7 and 18 of this Decision.
14, 18, 20	*Denied* for reasons stated in the whole of this Decision.
15	*Denied.* The Administrative Law Judge's conclusions are based on the record evidence.
16	*Denied.* The Presiding Judge's conclusion is supported by the record. See paragraphs 16–23 of this Decision.
17	*Denied.* Federal regulation is not precluded because St. J. is a connecting carrier. See paragraph 23 of this Decision.
19	*Denied.* The physical difference between the DRP's supplied by St. J. and by AT&T are not of decisional significance because all equipment furnished with this DRP facility are to be tariffed pursuant to interstate tariffs i; they are at any time used with the DRP for interconnecting interstate communication. See paragraph 24 of this Decision.

RULINGS ON EXCEPTIONS OF THE COMMON CARRIER BUREAU

1	*Granted.* Paragraph 4 of the Initial Decision is modified to reflect the Common Carrier Bureau's position, *i.e.*, that the DRP should be charged according to its relative interstate-intrastate use.
2	*Denied* for the reasons stated in this Decision.
3	*Denied.* See paragraphs 24 and 25 of this Decision.

APPENDIX "B"

F.C.C. 70–1057

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of THE UNITED STATES DEPARTMENT OF DEFENSE, COMPLAINANT *v.* AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.,[1] DEFENDANTS	Docket No. 18031

MEMORANDUM OPINION AND ORDER

(Adopted September 30, 1970; Released October 6, 1970)

BY THE COMMISSION: COMMISSIONER WELLS ABSENT.

1. On September 9, 1970, we adopted a Memorandum Opinion and Order, dismissing a complaint by the United States Department of Defense (DOD) against the American Telephone and Telegraph Company (AT&T) in Docket No. 18478 (FCC 70–961). That complaint related to the reasonableness of charges by AT&T for a special air/ground communications service, commonly known as "Nightwatch", furnished to DOD. We dismissed that complaint on the basis of a joint motion by DOD and AT&T setting forth the terms of an agreement between DOD and AT&T under which AT&T has made and will continue to make certain studies that will provide improved methods for estimating the location

[1] The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of Maryland, Southwestern Bell Telephone Company, Southern Bell Telephone and Telegraph Company, Ohio Bell Telephone Company, The Mountain States Telephone and Telegraph Company, International Telephone and Telegraph Corp., General Telephone Company of Florida, Northwestern Bell Telephone Company and Hawaiian Telephone Company.

lives of special facilities and systems furnished to DOD and for fixing the rates therefor based upon such estimated location lives. Under the agreement AT&T proposes to effectuate substantial reduction in rates for certain special equipment items provided to DOD. We summarize the terms of this agreement in paragraphs 3 and 4 of the aforementioned Memorandum Opinion and Order of September 9, 1970.

2. We now have before us another Motion that is related to the foregoing, namely, a Motion by DOD to dismiss the complaint that is captioned above, in Docket No. 18031. The above-captioned complaint is brought against AT&T, Hawaiian Telephone Company and other companies and relates principally to the reasonableness of the charges for a special private line telephone system, usually referred to as "COPAN" (command post alerting network) furnished to DOD. In this complaint DOD makes essentially the same allegations, concerning the reasonableness of the charges for "COPAN", as it made in the aforementioned "Nightwatch" complaint and requests dismissal thereof for the same reasons. We stated in paragraph 4 of our Memorandum Opinion and Order of September 9, 1970 that the Joint Motion for dismissal of the "Nightwatch" complaint recites that AT&T will file the aforementioned rate reductions after the dismissal of both the "Nightwatch" and "COPAN" complaints.

3. The reasons stated in our Memorandum Opinion and Order of September 9 for dismissing the "Nightwatch" complaint also warrant dismissal of the "COPAN" complaint against all parties other than Hawaiian Telephone Company. We shall therefore grant DOD's motion.

4. DOD's sole remaining complaint against Hawaiian is that, although all of the other defendants herein have agreed that the charges for all "COPAN" equipment and facilities should be published in tariffs filed with this Commission, and have taken steps to file such tariffs, Hawaiian refuses to do so. DOD claims that the "COPAN" service, in its entirety, is interstate. Hawaiian contends that certain portions of the "COPAN" service facilities, namely the terminal equipment and facilities associated therewith, are intrastate and not interstate and therefore are not subject to the jurisdiction of the Commission.

5. Hawaiian asserts that the terminal facilities in question are provided for or in connection with intrastate communications services within Hawaii. Hawaiian admits, however, that such facilities are actually used to provide both interstate and intrastate communications services. Hawaiian states that schedules of charges and regulations for such terminal equipment are on file with the Public Utilities Commission of the State of Hawaii and that schedules of charges for interstate services furnished *through* such equipment have been filed with this Commission. It is Hawaiian's position that since it is providing a *capability* of communicating within Hawaii, this constitutes exchange service within the meaning of Section 3(r) of the Act and that provision of the terminal facilities in question is not subject to the jurisdiction of the Commission under Section 221(b) of the Act.

6. The fact that a *capability* is provided by Hawaiian to DOD for communication between stations located wholly within Hawaii does not mean that the facilities in question are intrastate and not subject to our jurisdiction. To the contrary, the undisputed facts on the pleadings are that the networks are used for interstate service over which the Commission has jurisdiction under Section 2(a) of the Act. The Commission has held in many cases that, where equipment is used by a customer for both interstate and intrastate communications, the Commission has jurisdiction over the provision of that equipment to the extent that it is used for interstate communications (e.g., *AT&T—Railroad Interconnections*, 32 F.C.C. 337, 339 (1962); *Fallon Travelodge* v. *Churchill County Telephone and Telegraph System*, 14 F.C.C. 2d 972 (1968); *c.f.*, *Use of Recording Devices*, 11 F.C.C. 1033 at 1047 (1947); *Jordaphone Corp. of America* v. *AT&T*, 18 F.C.C. 644 (1954); *Hush-A-Phone Corp.* v. *AT&T*, F.C.C. 55–1242 (1955)). We conclude therefore that Hawaiian Telephone Company is required under Section 203 of the Act to file appropriate tariff schedules with the Commission for the interstate use of the equipment in question.

7. ACCORDINGLY, IT IS ORDERED, That the complaint filed herein is HEREBY DISMISSED as to all defendants except Hawaiian Telephone Company.

8. IT IS FURTHER ORDERED, That not later than 30 days after the service of this Order, Hawaiian Telephone Company shall file appropriate tariffs under Section 203 of the Act for all of the equipment and facilities in the "COPAN" network which it provides for interstate communications.

9. IT IS FURTHER ORDERED, That, UPON FILING of the appropriate tariff schedules by Hawaiian Telephone Company and acceptance of such tariffs by the Commission, the complaint herein WILL BE DISMISSED as to Hawaiian.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

38 F.C.C. 2d

F.C.C 71D-35

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

THE UNITED STATES DEPARTMENT OF DEFENSE, COMPLAINANT v. GENERAL TELEPHONE COMPANY OF THE NORTHWEST, GENERAL TELEPHONE COMPANY OF CALIFORNIA, GENERAL TELEPHONE COMPANY OF WISCONSIN, GENERAL TELEPHONE COMPANY OF FLORIDA, WEST COAST TELEPHONE COMPANY OF CALIFORNIA, ST. JOSEPH TELEPHONE AND TELEGRAPH COMPANY, UNITED TELEPHONE COMPANY OF THE NORTHWEST, NEVADA TELEPHONE-TELEGRAPH COMPANY, DEFENDANTS.	Docket No. 18536

APPEARANCES

Curtis L. Wagner, Jr., Esq., on behalf of the United States Department of Defense; *William Malone, Esq.*, on behalf of General Telephone Company Defendants; *Marian Jean Dabney* and *J. Bryan Whitworth, Esqs.*, on behalf of American Telephone and Telegraph Company; *Lloyd D. Young, Esq.*, on behalf of United Telephone Company of the Northwest; *Daryal A. Myse, Esq.*, on behalf of St. Joseph Telephone and Telegraph Co., *Proctor Hug, Jr., Esq.*, on behalf of Nevada Telephone-Telegraph Co.; and *Cecil O. Simpson, Esq.*, on behalf of the Chief, Common Carrier Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER FREDERICK W. DENNISTON

(Issued June 21, 1971; Released June 23, 1971)

PRELIMINARY STATEMENT

1. By Complaint filed April 28, 1969, the Department of Defense (herein as Department or DOD), alleged that certain telephone equipment known as Dial Restoration Panel (DRP) equipment is provided at 77 locations in the United States, of which nine are furnished by defendants herein; that all but the nine DRP's supplied by defendants are provided pursuant to an interstate tariff filed with this Commission by American Telephone and Telegraph Company (AT&T) Tariff FCC No. 260; and that defendants have insisted on providing the DRP units under intrastate tariffs filed with state regulatory commissions, refusing to treat the matter as interstate in nature. Following general denials by defendants, the Commission designated the

matter for hearing by Order adopted March 11, 1970, FCC 70-255, 22 FCC 2d 70, stating the jurisdictional question presented is "complex".

2. Subsequently, United Telephone Company of the Northwest and Nevada Telephone-Telegraph Company entered into joint agreements with the Department, by which the DRP's were withdrawn from the intrastate tariffs and priced under the AT&T interstate tariff, and requested dismissal of the complaint as to those two defendants. The Commission dismissed as to those two defendants by Order adopted April 8, 1971, FCC 71-362, 28 FCC 2d 713. The Commission designated AT&T as a party to the proceeding.

3. A prehearing conference was held July 28, 1970, and hearing sessions on September 8 and 9, November 3 and 4, and December 14, 1970, and the record was closed on the latter date. Proposed findings were filed by all parties and the Common Carrier Bureau and replies thereto by all except AT&T.

4. There is no essential dispute as to the nature or use of the DRP's, but there is sharp divergence on whether the provision of the equipment is interstate or intrastate in nature. Complainant and the Common Carrier Bureau strongly contend it is interstate; the surviving defendants, on the other hand, claim with equal vigor that it is intrastate and beyond this Commission's jurisdiction.

5. As the proposed findings of the Bureau appear adequately to state the facts, about which there is little dispute, the following findings essentially reflect the Bureau findings with minor modifications.

FINDINGS OF FACT

6. SAGE (Semi-automatic Ground Environment) is an air defense system network of communications circuits. The SAGE defense operations span the entire continental United States and parts of Canada. This area is divided into "regions" in which the Region Control Center is charged with the responsibility for air defense within its boundaries (DOD Exhibit No. 1, p. 2). None of the regions conform to any particular political divisions and no single control center is within the same state boundaries as all of the various ancillary units under its control (DOD Exhibit No. 1, p. 6). While SAGE represents the prime control system for air defense, BUIC (Back-Up Interceptor Control) has secondary responsibility for air defense and serves as a back-up system to SAGE in case the Region Control Center is not able to function adequately (DOD Exhibit No. 1, p. 3).

7. Plans were developed in 1963 by DOD to convert the SAGE/BUIC air defense system network of communications circuits to the switched environment network being developed and implemented for DOD. Implementation of these plans was accomplished by first combining the North American Air Defense/Air Defense Command switching system and the Army Switched Circuit Automatic Network (SCAN) in 1964. The second step was to merge the combined air defense switched network into the initial DOD Automatic Voice Network (AUTOVON) (DOD Exhibit No. 2, p. 4). Completion of

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the conversion to AUTOVON was achieved during the late 1965/early 1966 time period (DOD Exhibit No. 2, p. 5).

8. As the purpose of the SAGE/BUIC operations is to detect, identify and destroy enemy invaders, if necessary, the SAGE/BUIC communications system is appropriately complex. The various SAGE/BUIC operations are interconnected by the AUTOVON switched network and point-to-point networks providing for the transmission of voice, ground-to-air voice, teletype and data signals. AUTOVON is the chief means of communication in such operations (DOD Exhibit No. 1, p. 3). More specifically, SAGE/BUIC (hereinafter referred to as SAGE) operations utilize that portion of the AUTOVON network dedicated to SAGE use and do not have direct access to the general purpose AUTOVON network (Tr. p. 58).

9. In 1964, DOD had decided that there was a need to develop the equipment necessary to allow rapid manual restoration of degraded services or expansion of certain kinds of service (DOD Exhibit No. 2, p. 5). The concept was one of preemption, that is, that this would be done by manual seizure of a circuit used for a less vital service and employing such circuit channel to replace a more vital interrupted channel (DOD Exhibit No. 2, p. 5–6). To this end, DOD requested the appropriate common carriers to develop and provide Dial Restoration Panels (DRPs) for SAGE for a capability to establish, re-establish and restore voice, ground-to-air radio voice and data circuits between the three control centers within a region and its ancillary sites (DOD Exhibit No. 2, p. 6 and DOD Exhibit No. 1, p. 3 and p. 6).

10. The DRP itself is made up of dial restoration and access equipment which is installed at SAGE direction centers, NORAD control centers and at radio or radar sites. The DRP provides SAGE communication circuits with access to the AUTOVON switching network and with speedy restoration of service if there is trunk failure (Annex to General Exhibit No. 7, p. 1). The DRP functions as an access point for Common User Group (CUG) trunks, data trunks and PBX tie line circuits. The CUG and data trunks connect a direction center to a radar or combined radar/radio site. At both direction centers and sites, the trunks connect to a DRP and appear as 4-wire subscriber line circuits or links at an AUTOVON switching center (Annex to General Exhibit No. 7, p. 1).

11. The DRP equipment consists of three major components. These units of equipment are: (1) access lines and jack circuits, (2) an attendant telephone and key circuit, and (3) a central office and PBX line and signal circuit (Annex to General Exhibit No. 7, p. 2). The access lines and jack circuits consist of a panel of jacks and lamps and associated relay equipment. The panel has a pair of dial jacks, a pair of line jacks and a pair of equipment jacks for each CUG or data trunk passing through the dial restoration panel. The attendant telephone and key circuit provides the DRP with an attendant telephone, a position cord circuit, common function keys and associated control circuits. The typical DRP has a rotary dial to enable the attendant to use local PBX extensions and a TOUCH-TONE dial which enable the attendant to establish connections through the 4-wire

AUTOVON network (Annex to General Exhibit No. 7, p. 3). The line and signal circuit utilizes existing key telephone units (Annex to General Exhibit No. 7, p. 4). Thus, the DRP permits an attendant to establish connections, via AUTOVON, between SAGE terminal equipment at direction or control centers and radio/radar sites. During normal operations through connections can be made without the use of patch cords as the DRP provides for routine connections of PBX tie lines and CUG and data trunks. In an emergency, patch cords can be used to patch any internal SAGE circuit to any external AUTOVON line (Annex to General Exhibit No. 7, pp. 5–6).

12. Special consideration of a typical DRP–PBX access line arrangement is of value in examining the DRP. Thus, at the typical site the main block of the DRP would be equipped with the jacks and equipment for 10 ground-to-air and data lines and 10 PBX lines (Tr. p. 294). It would also be equipped with the keys for nine central office or station PBX lines and any miscellaneous equipment (Tr. p. 294). Adjunct to the main DRP block, but in another room, would be additional equipment for 10 more data lines, such as CUG, and 10 more PBX access lines (Tr. p. 293). Thus, at this one site there would be the capability of 40 circuits plus nine central office of PBX lines and miscellaneous circuitry (Tr. p. 295).

13. To originate calls over the local PBX lines the attendant operates one of the DRP's PBX line keys and when dial tone is received dials the desired number. An incoming call is indicated by a flashing lamp and audible ringing. The call is answered by operating the appropriate line key. When originating or receiving calls over PBX lines, the attendant's telephone and key circuit is connected to the line by the line and signal circuit (Annex General Exhibit No. 7, p. 1).

14. Idle CUG or data trunks which are not connected through the AUTOVON network are indicated by steady status lamps adjacent to the trunk jacks. To establish a CUG or data connection between a direction center and distant radio/radar sites, the attendant simply connects the position cord to the dial jacks of the idle trunk and dials the number assigned to the trunk at the distant site. When the site goes "off-hook", the local and site status lamps go out. The attendant at the local DRP operates the connect key establishing a connection through the AUTOVON network between the two locations (Annex to General Exhibit No. 7, p. 2).

15. To restore CUG or data connections when a line failure occurs, the attendant at a DRP utilizes a PBX access line. If a PBX tie line is busy it can be seized for this use. The attendant plugs the telephone and key circuit into the PBX jacks on the access line and jack circuit and dials the number assigned to the trunk at the distant end. When the distant end connection is established, the PBX line jack is patched to the affected trunk jack and service is restored utilizing the PBX line (Annex to General Exhibit No. 7, p. 2).

16. Different configurations of the DRP can be used to connect services that physically are wholly within a state as well as to connect interstate services (St. Joseph Exhibit No. 1, p. 2). The fol-

lowing example is illustrative. At a typical site, in Florida, a 200 line PBX is installed for local communications with an associated attendant's position. This 200 line PBX has a combination of local, intrastate, and interstate circuits which may be accessed from the equipment located on the DRP. The DRP operator utilizing the PBX lines which are terminated on the key shelf may originate a call over the PBX and through SAGE–AUTOVON switch circuits terminating at a point within the state of Florida or within another state. The attendant may also originate a call over the PBX to an off-premise PBX extension utilizing an intrastate circuit terminating within the state. The DRP attendant may also originate a local call to a local subscriber in the housing project at the site (Tyndall Air Force Base in this example), over the PBX and through a manual trunk from the PBX to the local military PBX serving the site and then through the exchange of the St. Joseph Telephone & Telegraph Company to a local subscriber in the housing project at the Air Force Base (St. Joseph Exhibit No. 1, pp. 2–3). At this representative site in Florida, the DRP attendant can also gain access to the intertoll network or to a local number. To do this, the attendant would put the position cord into a dial jack associated with an AUTOVON PBX trunk, dial the correct digits through a switching center to a local PBX station which is equipped with a manual conference or add-on conference arrangement, ask the person who answers the PBX station to dial a local number, or through an operator or the DDD (Direct Distance Dialing) network, place a toll call to another station through the long distance and local telephone network and, when the person at the station dialed answers, manually conference the DRP attendant with that station (St. Joseph Exhibit No. 1, p. 3).

17. In its operation, DRP can be used in a manner similar to a manual PBX (Annex to General Exhibit No. 7, p. 5). As such, a PBX is ordinarily considered local exchange equipment, tariffable with the appropriate state commissions, it is relevant to consider the significant similarities and differences of the PBX and the DRP in terms of purpose, capability, use and related items. A comparison of the important similarities and differences follows.

18. The primary purpose of the DRP is to restore, to establish and to re-establish SAGE data and ground-to-air communications necessary to the national defense mission of the Aerospace Defense Command (Tr. p. 98). This is accomplished via the 4-wire circuits through the AUTOVON switching (Annex to General Exhibit No. 7, pp. 5–6). By contrast, the primary purpose of the 2-wire PBX circuits provided with the DRP is internal in nature, providing coordination in level transition and circuit restoral among the various DRP sites (Tr. p. 98). The 2-wire PBX circuits associated with each DRP are necessary but secondary to accomplishment of the primary purpose. The PBX part of the DRP has the capability of accessing trunk lines into the AUTOVON network but does not have the capability of performing the DRP's primary functions (Tr. p. 95). Thus, the 2-wire DRP circuits are not able to be used for backup of the 4-

wire circuits or for restoring ground-to-air communications (Tr. p. 94).

19. The 4-wire circuits are intended and used for direct mission support but are also used in some situations to handle administrative traffic (Tr. p. 91). In the absence of the DRP, the administrative traffic would be handled merely through the ordinary dial PBX (Tr. p. 92). No comparative statistics were available for the record to indicate actual relative proportions between primary purpose use (to restore, establish or re-establish SAGE communications) and administrative use (Tr. p. 92). The 2-wire circuits are not supposed to be used for administrative traffic at all (Tr. p. 94).

20. The DRP attendant uses the jack field on the DRP as the basic tool to perform the functions necessary to achieve the primary purpose (Tr. p. 95). All 4-wire circuits that go through the DRP appear on the jack field of the DRP equipment; they do not, however, appear on the key shelf (Tr. p. 90). By contrast, the local PBX 2-wire circuits that go through the DRP equipment do not appear on the jack field but are located on the key shelf (Tr. p. 93)—the opposite situation of the 4-wire circuits. The only connection between the DRP and the PBX is appearance of the PBX access lines on the DRP. They serve completely different functions (Tr. p. 95).

21. Another comparison is also relevant. There are exchange facilities, comprised of local channels and interoffice channels, and there are interexchange facilities (Tr. p. 284). The local channel is the circuit between a central office and a customer. An interoffice facility is the one between a secondary office and a serving office in the exchange. An interexchange facility is one between one exchange area and another (Tr. p. 284). On the interexchange facilities several types of services are provided, including toll service. Toll facilities are used for either message toll or private line service. AUTOVON circuits are offered as private line service and are considered interstate in nature for tariff purposes (Tr. p. 285). Such interexchange toll facilities include the interexchange channel and the carrier equipment used to develop the channel (Tr. p. 285–286), but not the equipment that controls and supervises the channel (Tr. p. 286). The toll segment includes the toll test board and the jack field associated with it (Tr. p. 287). A toll test board also usually has local circuits available (Tr. p. 287). The equipment that interfaces a PBX to the facility is a trunk circuit (Tr. p. 288). A toll circuit would have a trunk circuit associated with it if the PBX being interfaced to the facility had a long-haul, two-way circuit (Tr. p. 288). The toll test board is analogous to the DRP (Tr. p. 303) and, as is apparent from the preceding several sentences, the analogy is meaningful because of their similar relationships to AUTOVON and the fact that both have local circuits available.

22. As already indicated in paragraphs 18, 19 and 20 above, the DRP operator position has both a 4-wire and a 2-wire capability. Without some sort of additional equipment, the 2-wire equipment will not "mate" with 4-wire equipment and vice versa (General Exhibit No. 7, p. 6). The DRP operator's ability to talk and dial

over either 2-wire or 4-wire circuits is achieved through the use of some common circuitry for the 2 or 4-wire capability (Tr. p. 303). Beyond such common equipment, the DRP consists of equipment designed exclusively for either 4-wire or 2-wire capability (Tr. p. 315). The majority of the DRP's components are devoted to 4-wire use (Tr. p. 315). The primary purpose for which the DRP is ordered, as discussed earlier, is dependent upon the 4-wire capability (Tr. p. 315). All other characteristics and capabilities are secondary to the primary purpose (Tr. p. 302). The normal PBX does not have 4-wire capability (Tr. p. 315) and cannot accomplish the primary purpose of DRP (restoral, establishment, re-establishment of AUTOVON circuits) (Tr. p. 323). However, as indicated earlier also, though the DRP PBX is not a usual PBX (Tr. p. 366), the customer uses the DRP in a manner similar to a switchboard position and the functions of the DRP in a manner similar to a switchboard position and the functions of the DRP are not restricted to implementing the primary purpose of the equipment (General Exhibit No. 7, p. 10).

23. The complainant has not demonstrated any monetary injury suffered by it as a result of any of the intrastate tariff filings for DRP.

DISCUSSION

24. This case raises important and delicate questions of Federal versus State jurisdiction, to which only limited address has been given in the past. That there is more than meets the eye is indicated by the nontraditional posture of a complainant who, if successful, may receive an increased bill from defendants rather than damages, and of defendants who are strongly resisting a conclusion which might increase rather than diminish their revenues. As aptly stated by one of the defendants:

> "The significance of this case, however, transcends the furnishing of dial restoration panels; indeed, it may well transcend the furnishing of private line service to the government. In this era of an increasing shift of the communications market to private line, with increasingly complex networks and interconnections, it becomes apparent that a decision here could substantially impact a large percentage of the carriers' non-residential business and might seriously upset the balance struck by Congress in Sections 2(b) and 221(b) of the 1934 Act between State and Federal regulatory jurisdiction."

(General Telephone Memorandum in support of Proposed Findings, p. 3).

25. The rapid growth and development of private communications networks, whether governmental or commercial, is a phenomena of recent vintage, having become established unhappily, long after the drafting of the Communications Act of 1934 and related amendments. As the Commission stated in the designation order, the present case presents a "complex" question.

26. It cannot be questioned that a communications network such as described herein, of which the DRP is a part, is "so fused and interdependent that the whole enterprise is within reach of the commerce power of Congress . . . " *Connecticut Co.* v. *Power Commission*, 324 U.S. 515, 529 (1945). Whether Congress has specifically excluded

the DRP from the reach of FCC control, however, is the thorny question that must be here decided.

27. Complainant points to the fact that the American Telephone and Telegraph Co. (AT&T), and all other participating telephone companies, including two of the original defendants herein, have removed the DRP from the intrastate tariffs and that even the seven defendants are either concurring or connecting carrier parties to AT&T Tariff No. 260, in which the interstate charges are specified. It also cites the decision of this Commission in the COPAN case, mentioned below, as does the Bureau. On the other hand, General and St. Joseph base their contentions on behalf of State jurisdiction primarily on Section 2(a) and (b) and 221(b) of the Act.

28. The COPAN decision, released October 6, 1970, FCC 70-1057, previously alluded to, is unreported. It deals with a complaint by DOD against AT&T, Hawaiian Telephone Company and others, with respect to charges for a special private line telephone system referred to as COPAN (command post alerting network). The pertinent portion of that decision follows:

> "Hawaiian asserts that the terminal facilities in question are provided for or in connection with intrastate communications services within Hawaii. Hawaiian admits, however, that such facilities are actually used to provide both interstate and intrastate communications services. Hawaiian states that schedules of charges and regulations for such terminal equipment are on file with the Public Utilities Commission of the State of Hawaii and that schedules of charges for interstate services furnished *through* such equipment have been filed with this Commission. It is Hawaiian's position that since it is providing a *capability* of communicating within Hawaii, this constitutes exchange service within the meaning of Section 3(r) of the Act and that provision of the terminal facilities in question is not subject to the jurisdiction of the Commission under Section 221(b) of the Act.
>
> "The fact that a *capability* is provided by Hawaiian to DOD for communication between stations located wholly within Hawaii does not mean that the facilities in question are intrastate and not subject to our jurisdiction. To the contrary, the undisputed facts on the pleadings are that the networks are used for interstate service over which the Commission has jurisdiction under Section 2(a) of the Act. The Commission has held in many cases that, where equipment is used by a customer for both interstate and intrastate communications, the Commission has jurisdiction over the provision of that equipment to the extent that it is used for interstate communications (e.g., *AT&T-Railroad Interconnections*, 32 F.C.C. 337, 339 (1962); *Fallon Travelodge* v. *Churchill County Telephone and Telegraph System*, 14 F.C.C. 2d 972 (1968); *c.f., Use of Recording Devices*, 11 F.C.C. 1033 at 1047 (1947); *Jordaphone Corp. of America* v. *AT&T*, 18 F.C.C. 644 (1954); *Hush-A-Phone Corp.* v. *AT&T*, F.C.C. 55-1242 (1955)). We conclude therefore that Hawaiian Telephone Company is required under Section 203 of the Act to file appropriate tariff schedules with the Commission for the interstate use of the equipment in question."

29. Both St. Joseph and General attack the principle of relative use implicit in the COPAN decision, or its precedential value here. General, moreover, contends that the summary method of disposition of COPAN, and lack of rationalization, in effect supplies an answer but no solution, stressing the difficulties of day-to-day operations in seeking solutions to specific problems. It is plain that COPAN, if applied here, would leave the determination of the relative proportions of intrastate vs. interstate use within the control of the customer, as the entire system is specifically dedicated to and under the control

of the customer. The Hearing Examiner concurs that the COPAN decision is not the solution to the question here presented and if applied would leave unresolved the basic problem.

30. The first, and most critical question is whether Section 221(b) excludes the Commission from jurisdiction because as defendants contend, the DRP is a "telephone exchange service." That term is defined in Section 3(r) as "service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange and which is covered by the exchange service charge."

31. Defendants apparently construe this to mean that any services they perform within the geographical limits of their service areas, are telephone exchange service. When the hearings were held on the bill which was enacted as the Communications Act, representatives of National Association of Railroad and Utilities Commission sponsored Section 221(b) and related provisions, as a means of preventing a voiding of the state power to regulate because of the so-called Shreveport doctrine under the Interstate Commerce Act (*Houston & Texas Ry.* v. *United States*, 234 U.S. 342). Their relevant comments[1] included:

"We endorse the principle of this bill, because it specifically reserves to the State governments their rightful powers over matters of purely State concern, such as so-called 'exchange' or local rates of telephone companies (p. 132)."

The Senate Committee Report[2] explained the purpose of 221(b) to be to "conform to recommendations of the State commissions and will enable those commissions, where authorized to do so, to regulate exchange services in metropolitan areas overlapping state lines" (p. 5). The identical explanation appeared in the House Report.[3] Subsequent amendment by a 1954 Act (48 Stat. 1065) was for the purpose of including radio, as well as wire transmission within the exemption, but did not otherwise modify it.

32. The Commission has previously rejected the concept that all local services rendered by telephone common carriers automatically falls within the "exchange service" exemption. Compare *General Telephone Company of California*, 13 FCC 2d 448; affirmed *General Telephone Co.* v. *FCC*, 413 F. 2d 390, *certiorari* denied, 396 U.S. 888.

33. Defendants, on the other hand, reply on what they call the "contamination" theory,[4] under which any equipment on which is terminated any line which is part of the local exchange service would apparently be classified as intrastate. Although described as "classic" theory and generally "accepted" in the telephone industry, it is supported solely by assertion and no legal basis for it is advanced. It

[1] Hearings on S. 2910, U.S. Senate Committee on Interstate Commerce, 73rd Cong., 2nd Session.

[2] Senate Report No. 781, 73rd Cong.

[3] House Report No. 1850, 73rd Cong. It is noted that General's Reply brief gives no consideration to these explanatory statements or the testimony on which it is based, relying rather on a brief sentence in the summary General Analysis of the Bill.

[4] "Where an interstate circuit terminates in a piece of equipment and also terminating in that piece of equipment is an intrastate circuit, that piece of equipment which would otherwise be interstate is contaminated and thereby considered wholly intrastate." (Tr. 237).

appears that such theory, while not so labeled, in effect, was rejected by the Commission as long ago as 1947. *Use of Recording Devices*, 11 FCC 1033.

34. The General defendants argue, moreover, that Section 2(a) of the Act asserts something less than full Federal control. That section, however, in common with other Federal regulatory statutes, clearly is plenary and the only question relates to what has been withheld from the Commission's jurisdiction by exceptions such as set out in Section 2(b). The courts have stressed the breadth of Section 2(a) of the Act. [47 USC 152(e)] in sustaining Commission jurisdiction. *U.S.* v. *Southwestern Cable Co.*, 392 U.S. 157, 167 (1968).

CONCLUSIONS

1. The DRP is a portion of a nationwide interstate special purpose communications system for national defense, designed and used for interstate communication services.

2. The DRP is utilized in this special purpose interstate communications system under the operation of the user, the Department of Defense, and is not utilized in telephone exchange service within the meaning of Section 2(r) of the Act.

3. The fact that connections may be provided to telephone exchange facilities or that there are some similarities between the DRP and ordinary exchange facilities, does not change the basic nature of the DRP equipment or the system it serves. The system being under the control of the user, whether or to what extent it might be used in connection with a service that could be classified as intrastate, is indeterminable, and the doctrine of relative use is inapplicable.

4. In providing the DRP equipment described, St. Joseph Telephone and Telegraph Co. is not providing "intrastate communication service" as contemplated by Section 2(b)(1) of the Act.

5. In providing the DRP equipment described, General Telephone Company of the Northwest, General Telephone Company of California, General Telephone Company of Wisconsin, General Telephone Company of Florida, and West Coast Telephone Company of California, if within the ambit of Section 2(b)(2) of the Act are nevertheless subject to Sections 201 through 205, by reason of the concluding provision of Section 2(b).

ULTIMATE FINDINGS

6. *Issue 1:* The furnishing of Dial Restoration Panel (DRP) equipment to the Department of Defense in conjunction with the SAGE/BUIC communications network, represent interstate services subject to the Communications Act, and the collection of charges pursuant to tariffs other than as filed pursuant to Section 203 of that Act, is unlawful.

7. *Issue 2:* Complainant has not shown the extent of damages, if any, to which it has been subjected by the charges unlawfully billed to it, and, indeed, the charges actually collected by defendants may have been undercharges. The portion of the complaint seeking damages must be dismissed.

8. *Issue 3:* American Telephone and Telegraph Company (AT&T), has already published charges covering DRP equipment as to which defendants are either connecting or concurring carriers, and it does not appear that any order directed to AT&T is required herein.

In view of the foregoing, and in accordance with the prayer of the complainant, defendants, and each of them, are required to cease and desist from violations of Section 203(c) of the Act by charging or collecting any charges for DRP services or equipment other than in accord with AT&T Tariff FCC No. 260, or such other effective tariff as may properly be filed with this Commission under Section 203(a).

IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion, in accordance with the provisions of Section 1.276 of the Rules, defendants shall, within two days of the effective date of this Initial Decision, CEASE AND DESIST from charging rates or charges except in accordance with an effective tariff on file with this Commission. In all other respects, the Complaint IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
FREDERICK W. DENNISTON, *Hearing Examiner.*

F.C.C. 72-1166

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of WESTERN UNION INTERNATIONAL, INC. Application for consent to transfer of control of Western Union International, Inc. and its subsidiaries to WUI, Inc.	File Nos. 2664-C2-TC-73, 2665-C2-TC-(2)-73, 121-CS6-TC-(8)-73: S-C-L-23-M, S-C-L-32-M, S-C-L-40-M, S-C-L-45-1-M, S-C-L-38-A-¼-M, 2662-C1/C2-TC-(18)-73, 2663-C1-TC-(6)-73, 837-M-TC-112, 2666-C2-TC-(7)-73

ORDER AND AUTHORIZATION

(Adopted December 20, 1972; Released December 21, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission has under consideration an application filed on October 10, 1972, by Western Union International, Inc. (WUInternational), a licensee of the Commission, for consent to a transfer of its, and its subsidiaries, control to a recently formed corporation, WUI, Inc.[1] WUInternational is: (1) a joint licensee of the Andover, Etam, Brewster, Jamesburg, Cayey, Puerto Rico, Paumalu, and Guam earth stations; (2) a joint licensee of the TAT-4, TAT-5, TAT-6 and Second Florida-St. Thomas cables; (3) the sole licensee of three cables providing telegraph communications between Florida and Cuba; and (4) a ship station radio licensee.[2] A subsidiary of the WUInternational, Airsignal International, Inc. holds a public coast station license, and it and four of its subsidiaries [3] hold licenses and construction permits in the Domestic Public Radio Service.[4]

---

[1] Public notice of this filing was given on November 13, 1972. No objections or comments to the subject application have been filed.

[2] See Appendix A for a list of licenses held by WUInternational. WUInternational also owns a number of other subsidiaries, i.e., C&W/Western Union International (C&W/WUI), British Western Union Ltd., Havana District Telegraph Company, Ocean Telegraph Company, WUI Service Corporation, Trans Atlantic Cable Ltd., WUI/TAS, Inc., and its subsidiary. Of these, only C&W/WUI, which operates in Puerto Rico and is equally owned by Cable & Wireless, Ltd., a British carrier, is a common carrier subject to the Commission's jurisdiction. WUInternational recently jointed with Fairchild Industries to form the American Satellite Corporation, an applicant for domestic satellite facilities.

[3] Airsignal International of Pittsburgh, Pennsylvania, Inc., Airsignal of California, Inc., Mobile Radio Telephone Service, Inc., National Communications Systems, Inc.

[4] See Appendix B for a list of licenses held by these subsidiaries.

2. Section 310 (b) of the Communications Act of 1934 requires a finding that the public interest, convenience and necessity will be served, as a condition to the transfer, assignment or disposition of a station license, in any manner, including through the transfer of control of any corporation holding such license. The submarine cable landing licenses held by Western Union International, Inc. each contain a condition patterned after Section 310 (b) which requires that the Commission give its prior consent to the indirect disposition of such licenses to any person by the transfer of control of the licensees named therein.

3. The instant application is prompted by a proposed corporate restructuring under which Western Union International, Inc. would become a wholly-owned subsidiary of the recently formed proposed parent corporation, WUI, Inc. The plan of merger includes WUInternational, with 3,062,050 of its 6,000,000 authorized common stock outstanding; the proposed parent, WUI, Inc., with 100 of its 6,000,000 authorized common shares outstanding and held by WUInternational; and WICO, a corporation with 100 of its 200 authorized shares outstanding and held by the parent. The WICO shares, owned by the proposed parent, are to be converted into the same number of WUInternational shares; the parent is to purchase the 100 outstanding shares of its own stock from WUInternational; all other outstanding shares of WUInternational are to be replaced, on a one for one basis, by shares of the parent corporation and distributed to WUInternational shareholders. The parent is to assume WUInternational's obligations under the existing stock options to purchase WUInternational stock, substituting its own stock for the WUInternational stock. This plan of reorganization was approved by WUInternational shareholders on May 9, 1972, subject to certain conditions, including the obtaining of governmental consent and agreement by the American Stock Exchange to list the parent's share in lieu of WUInternational's shares.

4. After the proposed reorganization, the directors and principal officers of WUInternational will assume identical positions with the parent. The certificate of incorporation and the by-laws of WUInternational will remain unchanged. WUInternational and its subsidiaries will continue to hold the licenses previously issued to them and no changes in its, or its subsidiaries, communications services or related charges are contemplated as a result of the proposed transfer.

5. WUInternational, to support a finding that the public interest will be served by a grant of the requested transfer of control authority, states that:

> **The proposed corporate reorganization should facilitate Commission regulation over applicant by clearly delineating regulated services from non-regulated services and activities that might be acquired or undertaken in the future. Moreover, any future regulated services in a line of business separate from that performed by applicant or its existing subsidiaries might be vested in new subsidiaries directly controlled by the parent, with resulting regulatory ease and corporate management efficiency. The corporate reorganization will also enable management, if and when it deems such action appropriate, to place its non-regulated Telephone Answering Service [WUI/TAS, Inc.] and its regulated subsidiary co-applicants (subject to any necessary governmental authorizations)**

as separate subsidiaries directly or indirectly controlled by the parent rather than by the applicant [WUInternational].

There is no firm indication, however, of any present intent or plan to realign the present subsidiaries, or to treat future acquisitions as indicated above. In this respect then, the proposed transfers of control of the subsidiaries of WUInternational are pro forma as the application suggests, since WUInternational "will continue for an initial period to own the subsidiaries" as it now does.

6. There appears, however, to be merit to allowing WUInternational, in conjunction with its proposed parent, certain latitude in re-aligning its present subsidiaries,[5] and in aligning future acquisitions in the manner suggested. WUInternational has represented, in connection with the instant application,[6] that the proposed corporate reorganization or steps taken pursuant thereto will not financially or otherwise alter the ability of the regulated companies involved to fulfill their statutory obligations.

7. In view of the foregoing and since the proposed transfer of control will not result in a violation of the provisions of Section 310(a) of the Communications Act of 1934, or any contained in relevant cable landing licenses, it appears that the proposed transfer of control will serve the public interest, convenience and necessity.

8. Accordingly, IT IS ORDERED, that consent IS HEREBY GIVEN to the transfer of control of Western Union International, Inc. and, thereby indirectly, of its subsidiaries to WUI, Inc. and:

(A) The actual transfer of control of WUInternational to WUI, Inc. in accordance with the terms of the application, shall be completed within 45 days from the date of release of this order, and notice in letter form shall forthwith be furnished to the Commission by WUI, Inc. showing when the acts necessary to effect the transfer of control were completed; and upon furnishing the Commission with such written notice the transfer of control will be considered completed;

(B) That the approval herein is conditioned upon full compliance with the representations made by the applicants in, or in conjunction with, the subject application, and that the undertakings of the parties for which this approval is given shall be carried out in good faith;

(C) That Western Union International, Inc. and WUI, Inc. submit copies of their balance sheets immediately prior to and subsequent to the transfer of control within 10 days after such transfer is completed;

(D) That separate accounts shall be kept by WUI, Inc. as well as by Western Union International, Inc., the present subsidiaries of Western Union International, Inc., and any future subsidiaries that may be controlled, directly or indirectly, by WUI, Inc.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[5] Any transfers of control of subsidiaries of WUInternational which hold Commission licenses will be subject to appropriate Commission authorization.
[6] By letter, filed on December 13, 1972 by Western Union International, Inc. in reference to the instant application.

APPENDIX A—LICENSES HELD BY WESTERN UNION INTERNATIONAL, INC.

Designation	*Geographic Location*
1. *Cables*:	
a. 2Kz–HVA, 3Kz–HVA, 4Kz–HVA.	Three cables providing for telegraph communications from Key West, Florida extending to Cuba; originally licensed to Western Union by a license dated November 20, 1920 from the President of the United States, and licensed to WUInternational February 27, 1961.
b. TAT–4	One cable providing for telephone and telegraphic communications between the State of New Jersey and France, jointly licensed to WUInternational and others on May 6, 1964.
c. TAT–5	One cable providing for telephone and telegraphic communications between the State of Rhode Island and Spain, jointly licensed to WUInternational and others on May 22, 1968.
d. TAT–6	One cable of a type designated SG providing for telephone and telegraph communications, between the State of Rhode Island and France, jointly licensed to WUInternational and others on March 28, 1972.
e. Second Florida–St. Thomas.	One cable providing telephone and telegraph communications between the State of Florida and the U.S. Virgin Islands jointly licensed to WUInternational and others on April 26, 1967.

Call Sign	*Geographic Location*
2. *Earth Stations*:	
a. WA20	Andover, Oxford County, Maine.
b. WA21	Etam, Preston County, West Virginia.
c. KA20	Brewster, Okanogun County, Washington.
d. KA23	Jamesburg, Monterey County, California.
e. WW20	Cayey, Puerto Rico.
f. KA24	Paumalu, Oahu, Hawaii.
g. KA21	Paumalu, Oahu, Hawaii.
h. KA28	Yona, Guam.
3. *Ship Station License*	Call Sign WA9003.

APPENDIX B—LICENSES OR PERMITS HELD BY SUBSIDIARIES OF WESTERN UNION INTERNATIONAL, INC.

1. *Maritime Mobile*

a. Airsignal International, Inc.

(1) Public Coast 3–B Station–KTD563

2. *Domestic Public Radio Services*

a. Airsignal International, Inc.

(1) KIE 953	(7) KKG 561	(13) KSV 991
(2) KIF 650	(8) KKE 964	(14) KOA 796
(3) KRS 687	(9) KAF 245	(15) KIJ 358
(4) KFL 895	(10) KIF 653	(16) KIQ 811
(5) KIF 651	(11) KAH 661	(17) KGC 591
(6) KKG 411	(12) KAA 285	(18) KJA 96

b. Airsignal of California, Inc.

(1) KMA 267	(3) KMA 219	(5) KMA 261
(2) KLF 648	(4) KMA 742	(6) KQZ 798

c. Airsignal International of Pittsburgh, Pennsylvania, Inc.
   (1) KGA 805
d. Mobile Radio Telephone Service, Inc.
   (1) KAA 276
   (2) KAQ 606
e. National Communications System, Inc.
   (1) KMM 703
   (2) KMM 706
   (3) KMM 704
   (4) KRM 981
   (5) KMM 705
   (6) KRM 982
   (7) KJU 808

F.C.C. 72-1129

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application ZENITH RADIO CORP. (ASSIGNOR) and GCC COMMUNICATIONS OF CHICAGO, INC. (ASSIGNEE) Application for voluntary assignment of license for radio Station WEFM-FM, Chicago, Illinois	File No. BAPLH-140

MEMORANDUM OPINION AND ORDER

(Adopted December 13, 1972; Released December 21, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT. COMMISSIONER REID CONCURRING IN THE RESULT. COMMISSIONER WILEY NOT PARTICIPATING.

1. We have before us the above captioned assignment application, a Petition to Deny timely filed by the Citizens Committee to Save WEFM, and responsive pleadings filed by the assignor, Zenith Radio Corp. [Zenith], assignee, GCC Communications of Chicago, Inc. (GCC-Chicago) and the Citizens Committee.[1]

2. The Citizens Committee is a not-for-profit association comprised of individual listeners of WEFM-FM who are opposing the assignee's programming proposals. No substantial question has been raised concerning the standing of the Citizens Committee, and we find that Petitioner is a party in interest under Section 309(d)(1) of the Communications Act of 1934, as amended. *Estate of John C. Mullins*, 36 FCC 2d 78 (1972).

3. WEFM-FM operates on 99.5 mhz with effective radiated power of 42kw (horizontal) and 35kw (vertical) with height above average terrain of 590 feet.[2] The license was issued to Zenith in February, 1940 and from that date through 1965, assignor provided a non-commercial classical music service to the Chicago area as a developmental adjunct to its manufacturing business. Zenith, since 1966, has operated WEFM on a commercial basis and during its entire period of operation, the programming format has always been classical music. GCC-Chicago proposes to change this format to one of "contemporary music"

[1] On November 20, 1972, Petitioner filed a document entitled "Complaint" relating to the subject assignment application. By this document, Petitioner requests that the Commission dedicate WEFM's channel for a "Classical and related cultural music" format station indefinitely. For a complete discussion of the "Complaint" see paragraph 27 below.

[2] The assignment application includes an outstanding construction permit (BPH-7677) issued on November 30, 1971 for effective radiated power of 6kw with height above average terrain of 1170 feet.

appealing to young adults. This change in format is the chief basis for Petitioner's objection to the application. Additionally, the Commission has received over 1,000 letters from Chicago area listeners protesting the proposed format change. Some of these letters are from Chicago area citizens: Felix Ganz, Dean, Chicago Musical College of Roosevelt University, Chicago; Leo E. Heim, President, American Conservatory of Music, Chicago; Enrique Alberto Arias, Dean, Chicago Conservatory College, Chicago; Shirley M. Schaefer, President, Women's Literary Club of Chicago; several area high school orchestras; several area music clubs; and several area religious leaders.

4. The Chicago metropolitan area is served by two additional classical music stations: WFMT–FM [3] non-commercial 24 hours per day and WNIB–FM [4] a commercial operation. The assignee believes that WNIB's operation is deficient in certain respects and that many listeners desire improved facilities for WNIB through increased power and stereo operation with vertical and horizontal polarization. Accordingly, assignee has made the following agreement with WNIB–FM which would be effective when the subject application is granted and consummated:

> 1. assignee will relinquish to WNIB the call letters "WEFM–FM" subject to our approval.
> 2. assignee will make a gift to WNIB of its stereo classical music library with the understanding that that library will be used in connection with the classical music programming presented by WNIB. The assignee estimates that the value is $40,000.
> 3. assignee will provide legal and engineering assistance which will be required by WNIB to obtain our consent to increase its power.
> 4. WEFM–FM is presently in the process of moving its transmitter and antenna to the John Hancock Building (BPH–7677). Assignee will make a gift to WNIB of a 10kw transmitter with stereo generator and associated equipment. This gift will enable WNIB to commence early stereo operation and is contingent on WEFM's move to the John Hancock Building.

5. Petitioner's main concern with the subject application centers on GCC–Chicago's proposed musical format. "Petitioners submit that the burden of proof is currently upon Zenith and GCC–Chicago to demonstrate that the public interest no longer requires three full time FM stations to serve these areas and population with a classical music format." (Pet. p. 8) Petitioner maintains that the three existing classical FM stations in Chicago, WEFM, WFMT, and WNIB, have had their licenses renewed due to representations by each station that classical music served the best interests of the public. In turn, argues petitioner, the Commission's renewal grants confirm the stations' determination that classical music must have three outlets on Chicago FM radio. Petitioner asserts that assignee is therefore *estopped* from changing WEFM's classical music format given WEFM's renewal in 1970 which was based on representations that classical music would continue during the station's entire three year license term. The Citizens Committee contends that GCC–Chicago's community survey and

[3] 98.7 mhz, 16kw, HAAT 1,170 feet.
[4] 97.1 mhz, 3.5kw, HAAT 580 feet.

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music preference study are irrelevant to "the issue of the legal right of the 7½ million people in the Chicago Metropolitan Area to continue to be entitled to three channels devoted basically to classical and cultural related programming." (Pet. p. 11) Finally, Petitioner claims that they "will in a public hearing demonstrate the public's continued right at this time, if not indefinitely, to the use of WEFM channel for its classical music format." (Pet. p. 9)

6. Additionally, the Petitioner has raised questions concerning other aspects of the subject assignment. The financial aspects of the application "present serious questions under SEC 310 b" of the Communications Act according to the Petitioner (Pet. p. 5). Specifically, Petitioner points to the fact that: Mr. Alexander Tanger has purchased all of the assignee's common stock (50% of the voting rights) for $500; assignee's parent (General Cinema Corp. hereinafter GCC) will make an unsecured loan of $1.3 million to GCC-Chicago for purposes of acquiring WEFM; $100,000 of expenses will be paid by assignee for improvement of facilities of the subject station; assignee is a company without any assets and created solely for the purpose of acquiring WEFM.

7. The petitioner questions the "propriety" of a clause in the sales contract for the subject station which gives either party the right to terminate the agreement within six months after the filing of the application or in the event the Commission designates the application for hearing. Petitioner contends that these provisions raise problems "as to the applicants right to impose upon the valuable time of the members of the Commission and its staff when the entire transaction may be voided by the simple fulfillment of the Commission's responsibility setting this case for a public hearing." (Pet. p. 7)

8. The Citizens Committee "disputes" assignee's qualifications to become the licensee of WEFM given the following: the unusual relationship between the assignee and its parent regarding financial matters; the failure of GCC to fully inform its shareholders of the basic issue in this case; the loss of $1 million during 1971 on other radio stations owned by GCC and its subsidiaries; and the failure by assignee to demonstrate how it can live up to WEFM's high record of public service in view of the inflated purchase price of $1,000,000.

9. Zenith has stated in the application that it is selling WEFM rather than continue to subsidize its operation and petitioner is disputing Zenith's claim of financial loss. Petitioner believes that a licensee is not guaranteed a profit when it is issued a license by the Commission and Zenith's claim of loss here does not "justify approval of the sale with or without a public hearing." (Pet. p. 13)

10. The assignor's opposition centers basically on the substantial losses incurred with the operation of WEFM as a classical music station: "Zenith can no longer justify the continued subsidization of WEFM." (Opp. p. 12) In support thereof, Zenith submits the following operation losses (excluding capital costs other than annual

depreciation and amortization) for the six calendar years during which WEFM has been operating on a commercial basis: [5]

1966	$372,019
1967	337,488
1968	277,721
1969	304,192
1970	316,864
1971	349,250
Total	$1,957,534

Zenith points out that petitioners have failed to cite specific facts upon which its "dispute" with assignor's losses are based. Moreover, Zenith argues that petitioner has not met the pleading requirements for petitions to deny as set out in *Chuck Stone V. FCC*, No. 71-1166 (D.C. Cir.) (Order June 30, 1972). Since petitioner's "dispute" with assignor's past operation is without factual support, Zenith argues that the Citizens Committee's objection must be rejected. Zenith concludes that its losses are a matter of record with the Commission as set out in its annual Financial Reports (FCC Form 324) and "Accordingly, there is no issue of fact which would justify a hearing." Finally, Zenith cites *WCAB, Inc.*, 27 FCC 2d 743 (1971) and *Biola Schools and Colleges, Inc.*, 29 FCC 2d 787 (1971) as support for its position that a proposed licensee cannot be expected to continue to bear heavy losses for the mere sake of retaining a particular musical format.

11. Zenith continues by stating that petitioner's remaining objections do not justify a hearing. Zenith quotes extensively from the *Chuck Stone* opinion, *supra.* concerning applicable standards for a petition to deny and concludes: "Measured against the standards of the Court's decision, the Petitioner's other allegations should also be rejected without a hearing." (Opp. p. 9). Zenith contends that petitioner's allegation that the renewal of WEFM, WFMT, and WNIB's licenses were based on the Commission determination that these three classical music formats must be continued is "fallacious". Given the dynamic quality of broadcasting which is constantly changing to meet the needs of its listening audiences, Zenith asserts that no format can be permanent.[6] *KNOK Broadcasting Inc.*, 29 FCC 2d 47 (1971) is cited as support for the fact that a licensee may change its musical format during a license term.

12. Zenith finds that with two other operating classical music stations in the Chicago area, the subject application can be distinguished from *Citizens Committee to Preserve the Present Programming of WONO(FM)* v. *FCC*, No. 71-1336 (D.C. Cir.) (Order May 13, 1971)

[5] Opp. p. 3. Zenith assumes *arguendo* that if one-half of these losses were offset by the maximum possible tax credit, the cumulative after-tax operating losses just since January 1, 1966 exceeds the $1 million sale price in this transaction.

[6] Zenith claims that during the last nine months of 1971, 112 radio stations changed their formats without Commission objection. Its source was *Broadcasting* for the period cited.

["WONO–FM"] and *Citizens Committee to Preserve the Voice of the Arts in Atlanta (WGKA–FM)* v. *FCC*, 436 F 2d 263 (D.C. Cir. 1970) ["WGKA"]. In each of those cases, Zenith points to the fact that no other station in the market carried classical music. In *Keys Corp.*, 31 FCC 2d 32 (1971), the Commission granted an assignment where the assignee proposed to eliminate the existing format while other stations in the market provided a musical format similar to that of the assignor.

13. Finally, Zenith contends that the termination clause of its sales contract with the assignee raises no substantial or material question of fact. Such clauses Zenith believes are routine in assignment applications for without them uncertainty would exist both for the applicants and the public.

14. The assignee in its Opposition (p. 14) concludes that "The objections of the Citizens Committee lack the requisite specificity, are largely conclusionary in nature, and do not raise any public interest questions." In support of a grant of the subject application, the assignee argues:

> Where . . . an applicant has made a detailed and good faith attempt to ascertain the needs, problems, interests and tastes of the community and, on the basis of such a study, has determined to change the musical format of the station, no grounds exist for designating such an application for hearing. This is certainly the case where two other stations in the community broadcast with the same musical format and GCC [Chicago] proposes to strengthen the weaker of the two to make it stronger and more viable. Finally, it certainly is the case where the existing licensee has accumulated a deficit of over two million dollars in an attempt to present its existing classical music format. (Opp. p. 2)

15. The assignee points out that the petitioner does not attack the adequacy of the conclusions reached in its survey of community needs, interests, and program preferences.[7] While petitioner simply labels these surveys as "irrelevant", assignee argues that the Commission does not decide program formats but rather it is the licensee's responsibility to choose a format that will best serve the public interest. Assignee stresses that if the survey is adequate and conclusions of the licensee based on that survey are reasonable and made in good faith, "the Commission will not substitute its judgment for that of the licensee." (Opp. p. 3)[8]

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[7] As part of assignee's survey of community needs and interests, a separate survey was conducted by Creative Research Associates, Inc. of Chicago to determine the general public's view of desired radio programming and of desired types of music. A total of 511 persons were interviewed throughout WEFM's coverage area by telephone. Respondents were asked what kind of radio programs they most liked to hear; the results were:

	Percent		*Percent*
Music only	31	"Educational"	5
News	21	"All Kinds"	5
Soothing music	12	Classical music	4
Panel/talk shows	11	Stories, dramas, etc	3
Rock music	8	Semi-Classical	3

Totals more than 100% due to multiple mentions.
They were then asked specifically what kind of music they would like to hear:

	Percent		*Percent*
Popular	32	Jazz	11
Semi-classical	20	Old-time/Big band	10
Rock and roll	18	Country and Western	8
Classical	18	Religious	7

[8] *Twin States Broadcasting, Inc.*, 24 RR 2d 766 (1972) is cited in support.

16. Assignee strongly maintains that it had an open mind with regard to a musical format when the sales contract was signed with Zenith. The Citizens Committee has alleged no facts which would support its allegation that assignee signed the contract with the intention of eliminating WEFM's classical music. In fact, assignee points out that it operates a full time classical music station in Atlanta, Georgia (WGKA–AM) and that it could have easily done the same in Chicago. However, after completing its community survey, assignee determined that it would program a musical format for young adults. This being the case, the assignee decided that classical music would not be consistent with the desire to reach this particular audience.

17. Assignee terms petitioner's argument that Chicago has a right to three classical music stations as conclusionary. It contends that the agreement between WNIB–FM and the assignee to improve the former's facilities, "will certainly affirmatively aid classical music and not weaken it by making possible two healthy viable classical music stations." (Opp. p. 6) Assignee argues that two classical music stations give ample service to the classical music audience and that its agreement with WNIB should be welcomed by any friend of classical music. In this regard assignee finds petitioner's objection to the WNIB agreement "startling." [9]

18. Assignee finally turns to cases that support its position. In WGKA *supra.*, the issue found by the Court was the profitability or lack thereof of the assignor's operation which, the assignee argues, is not present here. Given the fact that Zenith has lost money with WEFM, assignee cites *WCAB, Inc., supra.* as support for the proposition that an unprofitable format may be changed. Assignee argues that the case cannot be distinguished from the present assignment application. The assignee strongly maintains that the Citizens Committee has failed to meet its burden of alleging specific facts which would indicate that a grant of the application would be *prima facie* inconsistent with the public interest. (*Chuck Stone, Supra.*)

19. The Petitioner in its reply maintains that substantial and material questions of fact continue to exist in the application and that the applicants have failed to demonstrate that their application should be granted with or without a public hearing. Initially, Petitioner claims that:

GCC's community study is largely irrelevant for it is not an adequate study of the enormous area served by WEFM, or related to its concrete 'needs, problems, interests and tastes', . . . as affected by WEFM's long record, nor can its con-

[9] Petitioner questioned assignee's authority to make gifts of property to WNIB due to shareholder interests of the assignee's parent that may be affected. Assignee points out that any objection these shareholders may have can only be resolved through shareholder suits and the petitioner's objection has failed to raise any allegation as to how these proposals will affect the public interest. Assignee points out further that the qualifications of its parent are a matter of record with the Commission. The operating losses experienced by GCC's other broadcast stations "do not come in light of anything alleged in the Petition to Deny, and the ability of General Cinema to sustain additional losses if necessary by entry into the Chicago market has not been questioned." (Opp. p. 9, fn *). GCC's balance sheet submitted with the application lists current assets of $26.6 million which includes cash of $8.178 million; additionally current assets exceed current liabilities by over $3 million.

clusions be reasonable as vital underlying facts are absent from its study." (Reply p. 3)

Essentially, the Citizens Committee contends that GCC–Chicago "was under a duty to question [community leaders] on the specific and highly relevant point" concerning its proposal to abandon classical music. (Reply p. 11)[10]

20. Petitioner is still concerned by the GCC–Chicago/WNIB agreement and doubts the "propriety" of assignee's attempt to tie its relations with WNIB to the instant application. Petitioner claims that WNIB's coverage area is so inferior to that of WEFM making the agreement contrary to the public interest: "It is doubtful whether more than 10 to 20% of the WEFM audience find WNIB of any value to them." (Reply p. 10) In any event, petitioner argues that a material and substantial question of fact arises out of the extent of WNIB's service to WEFM's audience.

21. To support their argument that GCC–Chicago cannot change WEFM's existing musical format, the Committee states that "In two recent cases the Court of Appeals (D of C) has held program format changes, when opposed by substantial segments in the stations audience, raise 'public interest' questions requiring an evidentiary hearing." (Reply p. 7)[11] Petitioner also points to the *Primer on Ascertainment of Community Problems*, 27 FCC 2d 650, 679 & 680 (1971) where the Commission declared that special attention should be given to the *WGKA* decision when program formats are changed in connection with an assignment of the station's license. Petitioner also challenges the applicants' reliance on the *Chuck Stone*, *supra*. decision, since that case has nothing to do with the abandonment of classical music. Petitioner asserts that the assignee has failed to cite any Commission or Court decision resembling the "immense public interest issues presented here which serves as authority for the abandonment of the classical music format by GCC without a public hearing." (Reply p. 13).

22. Petitioner adheres to its original position that Zenith's losses have not been correctly presented. "We submit that the reliance upon Zenith's losses as a factor in approving this instant transaction without a public hearing would deny Petitioners their rights of due process." (Reply p. 14). The Citizens Committee maintains that Zenith's apparent losses must be questioned due to Zenith's continued use of WEFM to advertise its products.

23. Finally, Petitioner claims that the applicants have "violated WEFM listeners rights of due process by their grossly inadequate notice" concerning the proposed format change of the station (Reply p. 2). While Petitioner does not question assignor's notice as given and required under Section 1.580 of our Rules, it does argue that assignor was under a higher burden of giving notice which would include notice of assignee's programming plans. The Committee argues that the

[10] Two members of the Citizens Committee were interviewed as community leaders by the assignee, and they have expressed their opposition to GCC-Chicago's proposed program format.

[11] *WONO–FM*, supra and *WGKA*, supra.

primary issue in the application centers on GCC-Chicago's programming proposals and Zenith's notice omitted any reference to this fact and further that "[A]dequate notice of all material facts is, of course, all the more essential, where, as here, a hearing is discretionary." (Reply p. 5). (*Mullane V. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) is cited in support).

24. The issue here simply put is whether the assignee without a hearing can change the musical format of WEFM from classical music to a "contemporary music" format where there are two other classical music stations serving Chicago and the station has been suffering continuous operating losses.[12] As we recently stated in *Twin States Broadcasting, Inc.*, et. al. with respect to the necessity of a hearing on the assignee's decision to change the WGLN format from "Progressive Rock" to a "MOR" format:

> To do so would be tantamount to "locking in" a particular format and would severely impinge on the discretion and flexibility that a broadcaster must exercise in order to operate his station in the public interest. In sum, as we stated in *WCAB, Inc.*, in our system of broadcasting the decision as to the choice of entertainment formats is primarily in the discretion of the licensee and unless it is shown or appears to the Commission that the format choice is not reasonably attuned to the tastes and general interest of the community of license, we will not question the licensee's judgment in these matters.

There has been no showing here that the format of "contemporary music", chosen by the assignee in the exercise of its discretion, is not reasonably attuned to the tastes and needs of the Chicago listening public. Elementary understanding of the nature of the radio broadcast industry, especially in larger markets, shows that the choice of the musical format is primarily a business judgment by the applicant as to how he can operate the station with sufficient revenues to ensure its viability and meet his public interest obligations. While we may view it as commendable for assignor here to have operated WEFM as a classical music outlet with substantial and continuous losses, we cannot reasonably in the circumstances here, question the assignee's judgment as to the musical format which will enable it to best assure the station's viability. Although the Court of Appeals ordered a hearing in *WGKA*, that case involved the proposed termination of the only classical music format in Atlanta whereas here, there are two other classical music stations in Chicago. Moreover, there were questions of fact which the Court viewed as substantial and material which required resolution. We are of the view that extension of that holding beyond the limited confines of the facts and circumstances therein would be most

[12] (Footnote from page 8). The WEFM operating losses incurred over the past 6 years total $1,957,534. Petitioner in an attempt to create a factual issue here has suggested that we need to know the extent to which these losses were offset by other business activities or tax credits. We are of the view that no substantial question exists regarding the WEFM operational losses. However, since the existence of such losses is not of critical significance to our decision here, petitioner's speculations regarding the tax write offs, etc. would not raise "substantial and material" questions of fact which would require a hearing on this application.

unwise. As we have stated before, the use of a particular format is not a static thing. Indeed, "[I]t has been our experience that in the quest for viability broadcast licensees not infrequently completely change or alter their musical formats in response to their considered judgments as to audience preferences and the competition from the then existing musical formats."* To hamper the licensee's discretion in this area with the ominous threat of a hearing in a case like this would only serve to discourage licensees from choosing or experimenting with a format such as classical music, progressive rock, or other specialized formats. Accordingly, we find no basis to question the applicants discretion in the choice of format and we conclude that Petitioner has presented no material and substantial questions of fact which require a hearing on this application. In short, the existence of other classical music programming in Chicago coupled with the established long continuing losses experienced by the present licensee, affirmatively establish that the substantial and material questions which the Court, in *WGKA*, *supra*, found to be unresolved do not exist here.

25. Petitioner has also alleged in its Reply that the notice given by Zenith to announce the sale of WEFM, while conforming to the guidelines of Section 1.580 of our Rules, has, however, failed to provide WEFM's audience with proper notice and thereby lacked due process. The Citizens Committee argues that the notice read over the air should have included reference to assignee's proposal to eliminate WEFM's musical format. No such notice is required by our Rules. Our publication Rules (Section 1.580) simply requires the publication of a statement which identifies the parties to the application and the "Purpose for which the application was filed (i.e., construction permit, modification, transfer or assignment of control, renewal, etc.)" and states where the application is available for public inspection. The rule does not require the publication of a complete summary of the approximately 35 page application and related documents. We believe that such a simple announcement will alert interested parties to pursue their interests further. Petitioner cites *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950) as support for their argument that Zenith's notice did not afford WEFM's listeners due process.We find that the language of that decision, viz. ". . . within the limits of practicality notice must be such as is reasonably calculated to reach interested parties" (*Id.* at p. 318) has been misapplied by petitioner. We find that the notice as given by Zenith comes within the reasonable limits of practicality as required by the Court in *Mullane*. The notice advised the public of the pending sale of the station and indicated that the application itself would be on file at the station for public inspection by any person desiring further information on the terms of the sale. We find no substantial or material questions of fact concerning Zenith's public announcement of the subject assignment.

26. Concerning petitioner's other allegations as noted above, we find that the applicant has adequately responded to these charges. We find that petitioner's contentions concerning the corporate structure of assignee and its financial arrangements with its parent corporation,

*WCAB, Inc. supra, at p. 746.

raise no substantial and material questions of fact or public interest considerations which would require a hearing. The corporate structure and financial arrangements of the assignee are similar to that utilized by GCC in its recent acquisitions. Petitioner points out that some of the community leaders contacted by the assignee are opposed to the elimination of classical music on WEFM. The assignee responds by stating that its community leader survey is not required to ascertain programming and musical preferences but rather such a survey is designed to seek out *problems and issues* of the community. We find assignee's response to be persuasive and hold that the programming preferences of some leaders, while contrary to assignee's plans, do not in any way impair the validity of the assignee's community leader survey. In any event, in view of our above conclusions regarding the format change, these allegations raise no substantial or material questions. With regard to the questioned termination clause in the parties sales contract, we fail to find and petitioner has failed to point to any substantial or material questions of fact that would affect the public interest. While GCC and its subsidiaries have experienced some cash flow losses in operating other broadcast facilities, we are of the view that its financial position is such that the operation of WEFM will not be affected. Finally, GCC's agreement with WNIB–FM to improve its operation would appear to benefit the public interest and the classical music listeners in the Chicago area.

27. As noted in footnote #1 above, Petitioner has filed, on November 20, 1972, a document entitled "Complaint" which essentially requests the Commission to enter the following order or orders:

> "1. Set this Complaint for a public hearing.
> 2. Consolidate, for purposes of hearing only, this Complaint with the public hearing if and when ordered in File BAPLH–140.
> 3. Require Zenith to make available to the Citizens Committee to Save WEFM, Inc. Station WEFM for reasonable periods from time to time to discuss the issues in this proceeding without payment of any fees or charges by the Citizens Committee to Save WEFM, Inc.
> 4. Enter an order upon the completion of the hearing herein, directing that Channel 99.5 shall be set aside indefinitely for a classical music format as long as its listening audience remains interested in such classical music programming, and a qualified person, firm or corporation is willing to continue such classical music format."

The assignor and assignee have not commented on the merits of the "Complaint" arguing that it ". . . presents no new material not previously raised in the Petition to Deny and not extensively briefed in response to that document." The applicants contend that the "Complaint" should therefore be dismissed.

28. Although the "Complaint" is not specifically labeled as a supplemental pleading directed against the instant WEFM assignment application, it is directed against the parties to that application and the relief requested in the "Complaint" would preclude a grant of that application in its present form. Accordingly, it is in the nature of a supplemental pleading which is governed by Section 1.45 of our Rules, Subsection (c) of that Section provides that ". . . additional pleadings [in excess of Opposition and Reply pleadings] may be filed only if specifically requested or authorized by the Commission." Here the

Commission has not requested or authorized the filing of this additional pleading and thus, our rules of procedure and fairness to the parties require the dismissal of this "Complaint" pleading in-so-far as it pertains to the application before us. We have, nevertheless, considered the merits of the "Complaint" and we conclude that the public interest would not be served by a grant of the relief requested therein. As we have set out above in our treatment of the matters raised in the Petition to Deny, the choice of a particular musical format is primarily a business judgment which a licensee or applicant must make in determining whether he can successfully operate the station and render service to his community of license. The question of whether some other "qualified person, firm or corporation is willing to continue such a classical music format" can be of no consequence to the Commission in considering and acting upon this application. Section 310(b) of the Communications Act of 1934, as amended, states that in acting on an assignment or transfer of control application,

> ". . . the Commission may not consider whether the public interest, convenience and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee."

Thus, under the Act, we must consider only the application before us and the proposals made therein by the proposed assignee. In the circumstances before us we have concluded that the assignee's decision to change the WEFM musical format does not require an evidentiary hearing on the subject application. In view of this conclusion and our determinations that the applicant is fully qualified and that the public interest would be served by a grant of the application, a hearing on Petitioner's "Complaint" is clearly not warranted. Accordingly, on the merits, the relief requested in the "Complaint" must be denied.

29. In conclusion, we find that the Petitioner in its pleadings has failed to raise substantial or material questions of fact that would show that a grant of this application would not be in the public interest. ACCORDINGLY, IT IS ORDERED, That the Petition to Deny filed by the Citizens Committee to Save WEFM, IS DENIED, that, Petitioner's "Complaint" IS DISMISSED and that, the application for the assignment of the license for radio Station WEFM–FM, Chicago, Illinois, from Zenith Radio Corporation to GCC Communications of Chicago, Inc. IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

Before the Federal Communications Commission can grant an application for the assignment of a license, it must find that the public interest, convenience and necessity will be served by the grant. 47 USC § 301(b). Today, absent the requisite information upon which to base such a finding, the majority approves the assignment of WEFM–FM, Chicago, from Zenith Radio Corporation to GCC Communications of Chicago, Inc.

For 30 years, WEFM–FM provided its listeners in the Chicago area with a classical music format. The assignee, arguing that Zenith has experienced financial losses in recent years, proposes to change that format to one of "contemporary music." As the result of this proposed change—a proposal which was never communicated by the station to the public—the Citizens Committee to Save WEFM has filed a petition to deny this assignment. In addition, over 1000 Chicago residents have written to this Commission protesting the pending format change.

In response to this display of community concern, the majority holds (1) that WEFM–FM had no obligation to advise its listeners of its proposed format change, and (2) that no hearing is necessary in order to determine whether the assignment and its accompanying format change will serve the public interest.

In *Citizens Committee v FCC*, 436 F. 2d 263 (D.C. Cir. 1970), the Court of Appeals reversed a Commission grant of an application for a transfer of WGKY–AM–FM, Atlanta, Georgia. In that case the Commission had granted the transfer application without a hearing on the question of the public interest impact of the proposed change of format from classical music to a "blending of popular favorites, broadway hits, musical standards, and light classical music." The Court of Appeals held, in substance, that the Commission could not make the necessary factual determinations from the record as developed without a hearing.

The majority, as it has in the past, see *In Re Application of Keys Corporation*, 31 F. C. C. 2d 32 (1971), attempts to distinguish the *Citizens* case on the ground that the principles there enunciated do not apply where the format being extinguished is not the only format of that sort available to the community. Thus, the majority holds that it may determine, absent a hearing, that because there are currently three classical music stations available to listeners in the Chicago area, a change in the format of one of those stations will serve the public interest. Such an approach represents a gross misreading of *Citizens*.

First, in *Citizens* the assignee alleged that a second classical music station was available to Atlanta's listeners. The FCC majority agreed that that second station's signal reached a large portion of Atlanta's listenership, but the Court of Appeals held that such a determination could not be made absent a hearing. Likewise, in the instant case, it is alleged that one of the two classical music stations (WNIB–FM) which will remain after the demise of WEFM does not satisfactorily reach a substantial number of Chicago's population. The assignee concedes this point but proposes to aid that station after consummation of the instant assignment. Whether or not the assignee's proposals will, indeed, improve WNIB's signal, and the extent of the resulting improvement are questions of fact which cannot be answered absent a hearing.

Further, as in *Citizens*, the question whether the assignor, Zenith, has lost money on WEFM solely as the result of its classical music format is a question which cannot be answered without further investigation. The petitioners contend that Zenith's claims are questionable

because Zenith has continued to use WEFM to advertise its own products. The majority, preferring expedience to truth, simply rejects that contention.

After refusing to investigate in order to determine the requisite facts, the majority concludes that "There has been no showing here that the format of 'contemporary music' chosen by the assignee in the exercise of its discretion, is not reasonably attuned to the tastes and needs of the Chicago listening public." Given *Citizens*, that is truly a bizarre statement. First, it places on the public the burden of proving that the assignee's format change is not in the public interest, even though, at a later point in its opinion, the majority holds that the station has no obligation to inform the public of the impending change. Even Joseph Heller, author of *Catch-22*, would marvel at such reasoning.

Second, whether or not the proposed contemporary music format is reasonably attuned to the tastes and needs of the Chicago public is not, under *Citizens*, the relevant inquiry. Indeed, in *Citizens* the Court was presented with evidence which allegedly established that only 16% of the Atlanta community favored classical music over the new format proposed by WGKY. That evidence itself raised factual questions warranting a hearing, but the Court's primary point was that the mere fact that a format appeals to a majority in the community does not insulate the format change from further scrutiny. Rather, *Citizens* demands that when a station's proposed format change will decrease the diversity of broadcast formats within a given community, the Federal Communications Commission must determine whether that resulting decline can possibly serve the public interest. As the *Citizens* Court explained, we cannot make that determination simply by stating that a majority of the community would probably prefer the new format to the old.

Yet, that is precisely what the majority does today.

I dissent.